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ABSTRACT

The articles in this volume present the views of government representatives and others on law and policy affecting aliens, especially undocumented aliens, in the United States. Part 1 of the volume deals with legal rights and legal representation. Individual papers discuss the role and activities of the Immigration and Naturalization Service; aliens' legal rights in interrogation, detention, and arrest situations; deportation and exclusion proceedings; guidelines for lawyers representing aliens who face deportation or criminal charges; legal rights in the visa process; and procedures for appeal, judicial review, and motion practice in cases involving aliens. Papers in part 2 deal with possible law and policy changes to regularize the legal status of aliens or improve their plight, specifically addressing: current issues in immigration policy; policy developments and proposals for aliens under the Carter administration; criticisms of the Carter proposals; how immigration policy relates to labor policy, foreign policy, population growth, and naturalization; and legislative proposals concerning undocumented aliens. Contributors include Leonel J. Castillo, Austin T. Fragomen, Jr., Herman L. Bookford, Maurice A. Roberts, Jack Wasserman, Cornelius D. Scully, Peter Schey, Charles Gordon, Leonard F. Walentynowicz, Annie M. Gutierrez, David Crossland, Anthony J. Bevilacqua, Charles B. Keely, and Sam Bernsen. (Author/MJL)

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IN DEFENSE OF THE ALIEN

VOLUME 1

Immigration Law and Legal Representation

Proceedings of the 1978 Annual Legal Conference
on the Representation of Aliens
March 2 and 3, 1978
Washington, D. C.

EDITED BY

AUSTIN T. FRAGOMEN, JR. AND LYDIO F. TOMASI

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IN DEFENSE OF THE ALIEN

VOLUME 1

Immigration Law and Legal Representation

First Edition

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Introduction

THE Center for Migration Studies, in an effort to expand its breadth of activities in the field of international migration issues, has inaugurated a series of symposia on U.S. immigration law and policy. There can be little doubt that the immigration issue receiving the most public attention at present is the undocumented alien. Much controversy surrounds every aspect of this thorny issue from the number of undocumented to the impact of the undocumented upon our society. The analysis as well as the conclusions may vary. However, all agree that the present situation is undesirable and something must be done.

A frequently overlooked aspect of the plight of the undocumented worker is the highly technical legal aspects of his apprehension, detention, and expulsion from the United States. For, while the strategists and theoreticians debate the greater social issue, each day thousands of undocumented aliens are apprehended and expelled from our country.

The focal point for this year's program is the legal defense of the alien, which has two discreet aspects: 1) how the practitioner represents the alien in deportation or exclusion or in criminal proceedings; 2) what structural changes can be made in law or policy to regularize the undocumented alien or to improve his plight.

We are fortunate to have been able to draw upon the expertise of distinguished representatives of the government and well-known authorities in the field from the private sector. Together they provide a well-balanced and thorough analysis of the diverse ramifications of what will continue to be a major legal and social issue.

The Editors

Legislative and Judicial Developments

Part 1

Opening Remarks

LEONEL J. CASTILLO*

THE representation of the aliens is a subject which we in the Immigration and Naturalization Service have been examining closely.

Immigration is very much in the news today. The news media is giving it coverage that the subject has never had before, and the public is more aware of immigration as a factor in our society.

I believe one of the reasons the subject is of great interest to our country is because it illustrates the difficulties of continuing our best traditions under new and changing conditions. Specifically, immigration is a subject that tests the inherent tensions of the pragmatic humanism that Mr. Carter espouses, and I strongly support.

In my comments to you this morning, I want to stress three points: 1) INS is deeply committed and involved in bringing about a balance between our law enforcement responsibilities and our service to the public; 2) our efforts stem from a conviction that aliens should be accorded all possible protections and benefits under the law and Constitution. This is an area of extreme interest and concern to me personally and to the Immigration Service; and 3) INS policy is influenced by international and economic forces and constraints.

Although INS is probably the only Federal Agency that has both enforcement and service responsibilities, the two are not incompatible. The Immigration and Nationality Act requires regulation of entry to the country. Service to the public results from proper enforcement.

Service also means providing benefits to persons legally entitled to them. In addition, and probably most significant, service means the administration of the law in an effective, humane way because of the simple fact that we are dealing with human beings, regardless of their status. We have a responsibility to ensure that the INS does not overlook that humanistic factor in enforcing the law.

*Commissioner, Immigration and Naturalization Service.

We are improving our ability to enforce the law and provide services. One of the points in the President's proposal to Congress was increased enforcement on our Southern border. In the future we anticipate more people, more money, more equipment and new technology and systems to help us do that job better.

At the same time, we are trying to show greater consideration for the people whom we apprehend. This means, among other things, maintaining the highest standards possible in our holding areas.

At the same time we are working very hard to improve service to the public. Our first priority has been to reduce the backlogs. It is unconscionable that people should have to wait a year or more to be reunited with their families, because of our inability to process applications.

We have done this through the use of task forces, which have gone into larger districts that have had longest backlogs. Since June the nationwide backlog has been reduced from nearly a quarter million to less than 200,000. Authorization of overtime work has also been a significant factor.

We will continue to utilize task forces and overtime. But these are just short range solutions. As a matter of fact the new legislation permitting adjustment of Vietnamese parolees is like to build the backlogs right back up again. So we are seeking more money, more personnel, modern automated equipment and improved procedures to increase productivity.

We have been partially successful in that we are getting automated typewriters, mini-computers and automatic telephone answering devices.

We anticipate a conversion to make fuller use of automation. We have installed in Baltimore and Washington, on-line video display terminals to allow direct communication with our Master Index. This enables these offices to enter VPEA information into the index and to retrieve it in five seconds.

In Houston we are installing a prototype automated office that will enable us to find out what kind of automation we can use most effectively. This will become a model for other offices.

All of this is necessary, and I must admit that I am impatient that it be done quickly. It does take time, of course, but in the meantime our reputation is suffering, and many thousands are needlessly suffering.

We are trying to correct these deficiencies and to improve our handling of persons who have broken the immigration law. We do so not because of the INS reputation, but because of our conviction that aliens should be accorded all possible benefits and protections under the Constitution.

I have found it easier to deal with the administrative problems facing INS than those sticky policy problems. We are making progress in this area, too.

Regular dialogues with outside experts, immigration attorneys, voluntary agencies, the National Council of Churches and others have been invaluable in helping to shape this new policy. As a result we are implementing positive changes. We have had some successes.

Our change in the handling of refugee claimants is one example which was brought to the fore because of the Haitians involved in this process.

In the past, those who were looked upon as exclusion cases, meaning they had not, in the eyes of the law, effected an entry into the United States, were interviewed by an INS officer. Their cases were presented to the local District Director, who requested an opinion from the State Department, then made a decision, based in part on the recommendation from State.

The Service has found in the overwhelming number of cases that the claimants were economic refugees who did not qualify for asylum.

Last November we revised this procedure to provide such applicants for admission and opportunity to apply for asylum in an exclusion hearing before an immigration judge. They may be represented by counsel. This allows them an opportunity to make a complete and detailed record on the merits of their claim. The hearing officer can then consider every aspect of their request to remain in the United States under asylum.

Regulations effecting the new procedures are now being drafted. Those who would be affected by it may have their exclusion proceedings deferred until it becomes effective. In addition, those who have already had exclusion hearings and who wish to present their asylum claim before an immigration judge may reapply under the new procedure.

I am particularly proud of the reversal of our position on the Filipino war veterans, who more than 30 years ago were denied opportunity to apply for U.S. citizenship although the law said they could. After a finding by a U.S. District Court in favor of some 60 persons suing for their right to citizenship as a result of this, INS had appealed the decision. Only recently, the Solicitor General agreed with our recommendation to withdraw that appeal.

In other items under this general subject, we are moving toward providing aliens greater access to the appeal process, and at the same time working for more immigration judges. We are supporting the full use of the refugee provisions in the law, which welcomes persons from Communist dictatorships, but virtually ignores those from military or right wing tyrannical governments. We have also created an Office of Refugees and Parolees which will allow greater Service attention to these problems.

We are also opposing the development of a 'hodge-podge' of state and local laws concerning the hiring of undocumented aliens. We are supporting passage of a federal law that would accomplish this objective and would

be enforced more fairly by people who are trained to do so.

I believe all of these are major steps forward in dealing with immigrants and the matter of immigration. The President's proposals on immigration mark the biggest step. It will lift the vulnerable and exploited undocumented aliens to a status under which they are protected by law.

The amnesty that has been proposed is not popular — one side says it does not go far enough, while another says it goes too far and we are "giving the country away". I believe it is right — morally, historically and practically.

Our policies must be flexible and progressive because they are influenced by international economic forces and constraints in this world of constant and rapid change.

The international pressures are great, and will continue to be so. The Administration's statements and urgings on human rights require our Government to be especially cognizant of its own actions. World attention is focused on us, looking for violations in this country. Our attitude toward aliens cannot be excluded from this concern.

There are many areas that need examination and new policy formulated, such as, the brain drain and brain gain issues. Also, immigration should be a positive thing for both the sending country and the receiving country and not a losing or winning situation.

Economic pressures and considerations are major factors in immigration, and should be factors in policy determination. For example, I believe the number of immigrants should be more closely related to specific economic needs. There are just too many areas which immigration policy does not touch.

We have much work to do, and we have only just embarked upon a course that will bring INS and immigration policy into line with today's needs.

At INS we are trying to create an open and humane atmosphere. Some will disagree with our proposals and new policies; that disagreement comes both from within and outside of the Service.

I believe, however, no one disagrees with our efforts to create new systems to improve service to the public. As Government employees that is our reason for being there.

Interrogation, Arrest and Detention of Aliens

AUSTIN T. FRAGOMEN, JR.

IN defending aliens in the United States who have been charged either with a criminal violation of the law, or with deportability, an important consideration is whether the arrest or interrogation was lawful, and, therefore, whether any statements made by or documents seized from the alien in connection with the arrest are properly admissible as evidence. Of course, if it can be demonstrated that the initial arrest was unlawful, such statements and documentation would be considered inadmissible.¹

Until approximately three years ago, it was generally assumed that Immigration Officers, whether they were assigned to the Border Patrol or to the Investigations Branch, had more or less *carte blanche* authority to stop and interrogate any persons anywhere. In 1975, however, the Immigration and Naturalization Service, and perhaps more importantly, the Courts, discovered the Fourth Amendment, which protects the right of a person to be secure against unreasonable searches and seizures, and the Fifth Amendment which guarantees all persons due process of the law.

FOURTH AMENDMENT RIGHTS OF ALIENS

The Fourth Amendment protects all persons within the United States, including aliens, regardless of their immigration status, from unlawful searches and seizures. The Immigration and Naturalization Service (INS) was charged by Congress through the Immigration and Nationality Act, as amended, to enforce the immigration laws of the United States. In carrying out their duty, officers of the INS apprehend hundreds of thousands of

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¹ See, *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

undocumented aliens per year and enforce their departure from the United States. The difficulty lies in ascertaining who the undocumented aliens are in an actual law enforcement context. Specifically, in the area of the border, or in the interior of the United States, how can an immigration officer readily identify whether an individual is, in fact, an undocumented alien? Certainly, our country, steeped in a tradition of individual freedom, is not willing to tolerate indiscriminate questioning of members of the public, citizens and aliens alike as to their right to be in the United States. This would smack of police state tactics and would be abhorrent to our constitutional tradition of the right of the individual to be free from harassment by police authority.

Section 287 of the Act sets forth the basic power of immigration officers to interrogate, detain and arrest aliens. There are two subsections of Section 287 which are particularly significant because the vast majority of all arrests of aliens are predicated upon the authority set forth in Sections 287 (a) (3) and 287 (a) (1).

Section 287 (a) (3), the Border

Section 287 (a) (3) empowers an immigration officer within a reasonable distance from any exterior boundary of the United States to board and search for aliens, any vehicles, vessels, aircrafts or other types of conveyance. In the landmark decision of *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), the Supreme Court ruled that immigration officers were empowered with this broad authority to stop vehicles and to question the occupants thereof only at border crossing points or the functional equivalent thereof. Functional equivalency was defined as a particular location at which one could not reasonably arrive without having transversed the border. If two roads were to cross at a particular point at which the Immigration Service stopped a particular vehicle and questioned the occupants thereof, the issue would be whether that vehicle could have arrived at that point without having crossed the border. The *Almeida-Sanchez* rationale thus permits immigration officers to man border posts or to establish regular check stations or to stop persons at the functional equivalent of border-crossing points.

In the vicinity of the border, but away from the border proper, the law becomes more complicated if we are not dealing with a situation of the functional equivalent of a border-crossing point. The rules regarding the power of roving patrol cars to stop and interrogate aliens as opposed to interrogations at fixed check points is determinative. Where the arresting officers have founded or reasonable suspicion to believe that the subjects are aliens, Section 287 (a) (1) which empowers an immigration officer to

interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States, provides the underpinning for the authority of the immigration officer to stop the vehicle and question the occupants.² It is commonly held that where a law enforcement officer signals a motorist to stop by use of a siren or red light, there has been a seizure which must be justified under the Fourth Amendment. The seizure occurs when the officer first communicates the command to halt and the command must be valid when given.³ Thus, in a roving patrol situation, it would be incumbent upon the arresting officer to be able to set forth articulable facts upon which his founded or reasonable suspicion was based (in addition to foreign appearance of the subjects involved) at the time he formed the subjective intention to stop a particular vehicle and signaled to that vehicle that it was commanded by him to stop.

The rules regarding fixed check points differ substantially. The Supreme Court has taken the position that a fixed check point is inherently less intrusive of Fourth Amendment rights of aliens as well as citizens of the United States than the random methods of a roving patrol. However, to constitute a fixed or permanent traffic check point, there are certain minimal requirements. The motorist must have advanced warning that he will have to stop at a particular point. It would appear that it is necessary to indicate to motorists that this is for an official government purpose, preferably designating that purpose in advance. Moreover, the vehicle traffic is sufficiently heavy that an immigration officer in a roving patrol car would not be in a position, even briefly, to scrutinize passing vehicles. The flow of traffic must tend to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens.⁴ It is also essential that each check point be independently justifiable under these standards. It is not sufficient that the Immigration Service has established this check point as part of an overall network.⁵

Thus, at the border or in the vicinity of the border there are border inspections or inspections at the functional equivalent thereof, roving patrols, and fixed or permanent traffic check points. The powers of immigration officers to stop and interrogate persons at border points or their functional equivalent are extremely broad. The power at fixed or permanent traffic check points is almost as broad, although here the particular situation must meet the requirements mandated. Roving patrols at points that are not a functional equivalent of a border crossing point must have founded or reasonable suspicion upon which to predicate stopping a vehicle and interrogating the occupants.

² See, *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

³ See, *United States v. Morrison*, 546 F. 2d 319 (9th Circuit, 1976).

⁴ See, *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

⁵ See, *United States v. Sandoval-Ruano*, 346 F. Supp. 738 (S.D. Cal. 1977).

Section 287 (a) (1),

Enforcing the immigration laws within the interior of the United States presents unique problems under the Fourth Amendment. Section 287 (a) (1) sets forth the basic authority of the immigration officer to interrogate an alien or person believed to be an alien. In the *Brignoni-Ponce* decision, the words "believed to be" in Section 287 (a) (1) are interpreted by the Supreme Court as requiring founded or reasonable suspicion. Once again, such suspicion must be based upon articulable facts other than foreign appearance alone. The rationale first enunciated by the Supreme Court in a landmark decision of *Terry v. Ohio*, 92 U.S. 1 (1971) is adhered to. Recognizing that a brief investigator stop is less intrusive on the privacy of a traveller than a vehicular search, the Supreme Court held in *Brignoni-Ponce* that probable cause was not required, merely reasonable suspicion. The decision did limit the authority of the immigration official to make even a brief investigatory stop of a moving vehicle to situations where the officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country. The Court specifically avoided making a decision on the question of whether the immigration officer must have founded or reasonable suspicion to believe that the person is just an alien, thus including permanent resident aliens, or whether he must have such suspicion that the alien is in the United States unlawfully.

In *Cheung Tin Wong v. INS*, 468 F.2d 1123 (D.C. Cir. 1972), the United States Court of Appeals for the District of Columbia held that reasonable suspicion was present in a situation in which the arresting officers observed two individuals of apparent Asian ancestry in the vicinity of a Chinese restaurant. One individual motioned to a cab, the other got into the back seat of the cab and the individual who had first signalled the cab leaned over and spoke to the driver. The arresting officers testified that they concluded from the fact that one individual apparently gave directions to the cab driver while the other got in the back seat indicated that the passenger did not speak English. With the Asian appearance of the individuals involved in the vicinity of a Chinese restaurant, which was notorious for employing undocumented aliens and since it is a requirement for all persons who become naturalized to manifest a knowledge of the English language, evidence was sufficient to justify founded suspicion.

In *Illinois Migrant Council v. Pilliod*, 540 F. 2d 1062 (1976), the United States Court of Appeals for the Seventh Circuit found that where individuals were stopped and interrogated by immigration officers based exclusively on the foreign appearance of the individuals involved, such stops being somewhat detentative in nature, that the Fourth Amendment rights of the individuals had been violated and that the Immigration Service should be enjoined from engaging in such law enforcement activities.

Thus, it would appear that what is necessary is a test which requires, in most cases, foreign appearance plus some other clearly definable event or occurrence. However, the nature of the foreign appearance plus can only be determined once the threshold issue of whether the immigration officer must have founded or reasonable suspicion to believe that the individual is just an alien or an undocumented alien is first resolved. Obviously, since permanent resident aliens need not speak the English language, reading of foreign newspapers, speaking of foreign languages, or other facts indicating an inability to speak English or preference for a foreign language would be insufficient to believe that the person is an undocumented alien. Whereas, if the test is merely that the person is an alien, language abilities could be determinative. It is naive to think that persons who speak English poorly but well enough to become naturalized and live in large foreign language speaking communities would choose to communicate in English, not to mention the fact that there are literally millions of Puerto Ricans in the United States who are native born United States citizens who do not speak English competently. This question was not specifically addressed in the *Cheung Tin Wong* decision, but by inference the Court did indicate that the immigration officers need only believe that the person is an alien. The Supreme Court specifically avoided the question but noted its existence in the *Brignoni-Ponce* decision. The Seventh Circuit in the *Illinois Migrant Council* case observed that if an immigration officer approached the person suspected of alienage and casually inquired into the person's citizenship with no threat of detention, this would be permissible, but if there were a detention for questioning however brief, there must be reasonable suspicion of unlawful presence in the United States. Thus, the decision runs together the concepts of a definition of the term interrogate and the question of immigration status of the alien. As such, under the Seventh Circuit test, an immigration agent is permitted to question a person without detention concerning his right to be in the United States if the agent believes the person to be an alien. The test prohibits, however, an agent who does not have a belief, based on specific articulable facts, that a person he wishes to interrogate is illegally in the United States, from detaining that person by threat, force or command based on the agent's official authority.

Following this rationale, one is confronted with the concept that an immigration officer is allowed to question casually, an individual who is free to cooperate or not, only where the person is suspected of being an alien. To detain and interrogate that individual, however, the officers must have reasonable suspicion that the alien is in the United States unlawfully. In the context of moving vehicles the issue would appear to be clearer, for if stopping a vehicle is a "seizure" within the definition of the Fourth Amendment, then casual questioning of the occupants thereof becomes a theoretical impossibility. That is, where vehicular searches are involved, it would

appear that there must be reasonable suspicion of illegal alienage.

Obviously, it seems artificial to establish a different standard for pedestrians, factory workers, restaurant workers, or other individuals encountered by immigration officers in situations other than vehicles. In the landmark decision of *Marquez v. Kiley*, 436 F. Supp. 100 (S.D.N.Y. (1977)), the Court held:

Whatever theoretical appeal there may be to a rule which permits casual, voluntary questions upon suspicion of alienage alone, but requires suspicion of illegality for detention, is in our view substantially undermined by the realities of the matter. It is in the nature of an oxymoron to speak of 'casual' inquiry between a government official, armed with a badge and a gun and charged with enforcing the nation's immigration laws, and a person suspected of alienage... For a constitutional rule in these matters to depend on the 'voluntary cooperation' of the suspect is to impose a gloss upon real life. When it is further considered, the refusal to cooperate or to attempt to evade such 'casual encounter', indeed, even in the appearance of nervousness, may well be held to provide reasonable grounds to suspect unlawful presence and therefore, authorize forceable detention... The rule urged upon us by the government seems unworkable. The application of the Fourth Amendment requires Courts at times to develop artificial constructs which can never precisely conform to the fluid and infinitely various nature of contacts between government officials and the populace. In formulating such rules a Court should not ignore the realities of every day life.

Thus, a Court has finally recognized the reality that an immigration officer confronting an individual is necessarily in an intrusive and detentive circumstance by virtue of his power and authority. Following the rationale of the Southern District of New York, for an interrogation to take place lawfully within the confines of the Fourth Amendment, the immigration officer must have reasonable or founded suspicion to believe that the alien is in the United States unlawfully. Moreover, any questioning of the individual is an interrogation within the definition of Section 287 (a) (1). This interpretation will insure that aliens who are not in vehicles are accorded the same measure of constitutional protection as their counterparts who, by happenstance, are in vehicles. This rationale would apply as well to aliens interrogated on the premises of an employer, or on their own premises, as well as random street encounters. Thus, to interrogate, however casually, or for whatever brief duration, an immigration officer encountering an alien in a place of work would have to have reasonable suspicion to believe that he is confronting an undocumented alien.

Even the undocumented alien is protected by our Constitution. Through an understanding of the dimensions of his Fourth Amendment rights, the alien can be protected from abusive law enforcement techniques.

Interrogation and detention of aliens raises substantial due process

problems under the Fifth Amendment, as well. I am not going to address myself to due process considerations as it pertains to the hearing process, although obviously, the continuity of the procedure makes lines of demarcation hazy.

At the point of first encounter between the immigration officer and the alien, the question invariably arises as to whether the alien is entitled to Miranda warnings.⁶ Hornbook law instructs us that deportation proceedings are civil in nature, not criminal, and, therefore, Miranda warnings are not mandated. However, if the alien is the target of a possible criminal law violation as well as a deportation action, then Miranda warnings are required.⁷ Interestingly, the fact that operating instructions of the Service require Miranda-type warnings was never directly considered as violative of due process where Service officers had failed to comply with their operating directive. In *Trias-Hernandez v. INS*, 528 F. 2d 366 (9th Cir. 1975), the issue was not specifically addressed since there the Court was concerned with Miranda warnings per se, not minimal Miranda-type admonitions envisioned by regulation. Noncompliance with regulations has in other contexts been deemed adequate grounds for reversal of a deportation order.⁸ In *Bridges v. Nixon*, 326 U.S. 135 (1945), the Court vacated a deportation order because of noncompliance with a regulation requiring that statements used as evidence must be in writing and under oath and that a signature must be requested.

For the first time, a court, the U.S. Court of Appeals for the First Circuit, has thoughtfully analyzed the due process requirement of the law and the warnings issue.⁹ In that case, the alien was approached from behind as she was about to enter her apartment by a man who identified himself as an immigration officer. She opened her door and was followed in by the two immigration agents who questioned her and requested documents. She was subsequently taken to the Boston INS office where she was interrogated for four hours, from 10 P.M. to 2:15 A.M. Thereafter, she signed a statement admitting her illegal presence in the United States which provided the sole basis for her deportation.

The Court held that the facts and circumstances surrounding the obtaining of the statement were inherently coercive and, therefore, the statement was inadmissible as evidence since it had been obtained in contravention of her due process rights as guaranteed by the Fifth Amendment. Moreover, the court found that pursuant to the INS regulation, a person arrested without a warrant must be advised of certain rights quite apart from the *Miranda* rule as a basic due process right as guaranteed by the Fifth Amendment.

⁶ See, *Miranda v. Arizona*, 384 U.S. 436 (1966). ⁷ See, *Compos-Serrano v. I.N.S.*

⁸ See, *Accardi v. Shaughnessy*, 347 U.S. 200 (1954).

⁹ See, *Navia-Duran v. I.N.S.*, No. 77-1160 (Decided 12/30/77).

Then it is essential to comply with the regulation which requires that the alien be advised of the reason for his arrest and his right to be represented by counsel of his own choice, at no expense to the government, and finally, that any statement he makes may be used against him in a deportation proceeding.

Minimal standards of due process dictate that regulations pertaining to interrogation and detention must be adhered to lest Fifth Amendment rights are violated, for the court has said, in essence, that those regulations set forth the basic guarantee of the rights of the alien.

- 1) Where the alien is suspected of a felony, he must be brought without unnecessary delay before another near-by officer empowered to convict persons charged with offenses against the U.S. 8 C.F.R. Sect. 287.1 (d);
- 2) Where arrests without a warrant take place, the alien arrested shall be examined by an officer other than the arresting officer unless no other officer is readily available, 8 C.F.R. Sect. 287.3;
- 3) Any alien arrested must be advised that a decision will be made within 24 hours or less as to whether he continues in custody or is released on bond or recognizance, 8 C.F.R., Sect. 287.3.
- 4) Unless administrative voluntary departure has been granted, the case shall be presented within 24 hours to the district director, deputy district director, or acting district director for a determination as to whether prima facie evidence is present and for issuance of an order to show cause and a warrant of arrest. 8 C.F.R. Sect. 287.3.

There are numerous other regulations prescribing due process standards in the hearing proper. Arguably, each must be carefully observed or the Service will be exposed to challenge for failure to observe the right to a fair hearing.

The state of the law is rapidly undergoing change as aliens are assured basic rights under the constitution. Many of these rights attach at the stage of interrogation and arrest. The Service is no longer able to infringe upon these rights with impunity.

Deportation and Exclusion Proceedings

HERMAN L. BOOKFORD*

Nature of Deportation Proceedings

IT is apparent that decisions in deportation cases involve the gravest consequences for the persons involved. A student on the verge of completing his education may be deprived of the opportunity to secure his degree; a husband may be separated from his wife, or parents from their children; a political activist may be sent home to face imprisonment or other punitive action. Nevertheless, the courts have consistently adhered to the view expressed by the Supreme Court 65 years ago: In a case where the Government sought to deport a prostitute, it was determined that, any alien who falls within a class that Congress has declared to be undesirable, by facts which might constitute a crime under local law, is not convicted of a crime, nor deported as a punishment.¹ As a result, the alien in deportation proceedings — referred to in those proceedings as the respondent — is not entitled to the same procedural safeguards which would apply to a defendant in a criminal prosecution.²

Because a deportation proceeding is not criminal but is civil in nature,³ Congress may entrust decisions concerning deportability to an administrative tribunal, and a respondent would not, thereby, have been deprived of any rights under the Constitution because he refused a jury trial.⁴ However, the fact that deportation proceedings are civil in nature does not mean that the alien in deportation proceedings is deprived of the benefits of due process. The courts have held that an alien who is within the United States — in other words, an alien who is in expulsion or deportation proceedings, not in exclusion proceedings — is entitled to all the procedural safeguards provided

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¹ See, *Bugajewitz v. Adams*, 228 U.S. 585 (1913), *Lavoie v. INS*, 418 F.2d 732 (9th Cir. 1969).

² See, *Carlson v. Landon*, 342 U.S. 524 (1952).

³ See, *Pang v. INS*, 368 F.2d 637 (3d Cir. 1966).

⁴ See, *Zakonaite v. Wolf*, 226 U.S. 272 (1912).

in the Fifth Amendment. ⁵ Congress has recognized the basic elements comprising the process, and has codified, in Section 242(b) of the Immigration and Nationality Act of 1952 ⁶ the specific requirements for a fair hearing. Of course the mandates of the statute must be considered as minimum requirements, upon which additional directives may be imposed by the courts as they continue to interpret the Constitution. It should also be noted that the proceedings must comply not only with the requirements of the statute, but also with any additional requirements imposed by regulations. Any significant deviation from the regulations (set forth in Title 8, Code of Federal Regulations) will be considered to have deprived the alien of a fair hearing.⁷

Statutory Requirements Notice

The first requirement set forth in Section 242 (b) of the Immigration and Nationality Act states "The alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place which the proceedings will be held". Compliance with this requirement is achieved through issuance and service of a document entitled Order to Show Cause and Notice of Hearing. ⁸ The document gets its name from the final paragraph, which states, "Wherefore, you are ordered to appear for hearing before an Immigration Judge of the Immigration and Naturalization Service of the United States Department of Justice (at a specified location on a specified date, at a specified time) and show cause why you should not be deported from the United States on the charge(s) set forth above. Incidentally, if you examine the Immigration and Nationality Act you will not find the term "Immigration Judge": The Act states that deportation and exclusion proceedings shall be conducted before a "Special Inquiry Officer". However, by regulation, the term Special Inquiry Officer and Immigration Judge are now used interchangeably, ⁹ and the presiding official is now generally referred to as the "Immigration Judge".

Time of Hearing

The regulations require that the hearing be set at least seven days after service of the Order to Show Cause.¹⁰ Service may be accomplished by certified mail or by personal service upon the respondent.¹¹ The issuing officer may fix the time for the hearing at fewer than seven days if he

⁵ See, *Sung v. McGrath*, 339 U.S. 33 (1950). ⁶ See, 8 U.S.C. Par. 1252 (b).

⁷ See, *Bridges v. Nixon*, 326 U.S. 135 (1945).

⁸ Form I-221. If the district director decides to take the alien into custody at the time of serving the Order to Show Cause, Form I-221 S is used instead. The latter form adds the warrant of arrest to Form I-221. 8 CFR Par. 264.1 (b), 299.1

⁹ 8 CFR Par. 1.1 (1). ¹⁰ 8 CFR Par. 242.1 (b). ¹¹ 8 CFR Par. 242.1 (c).

believes that the public interest, safety or security so requires, or if the respondent requests a shorter period.¹² However, the mere fact that a respondent is in custody of the Service is not sufficient justification for holding a hearing in fewer than seven days after the issuance of the Order to Show Cause, in the absence of an express finding that the public interest requires a shortening of the usual period, and in the absence of a waiver or consent by the respondent.¹³ Before the hearing has begun, an adjournment or postment may be granted upon a showing of good cause, either at the instance of the official in charge or upon the request of the respondent. After the hearing has begun, adjournments are within the control of the Immigration Judge.¹⁴ The respondent may be granted a continuance for the purpose of obtaining counsel, but he will be granted only one such continuance unless he shows good cause for the granting of more time.¹⁵

Place of Hearing

The statute and the regulations are silent concerning the location of the hearing. However, it is generally held in the district where the alien resides; occasionally it may be held in the district where the alien has been arrested. Where the alien was arrested in Jersey City, and he contended that his hearing should have been held in Newark, the court held that he was not prejudiced or denied a fair hearing because the hearing was actually held in New York City, 15 miles from Newark.¹⁶ On the other hand, the deportation order was vacated and the case remanded where the hearing was held in Florida but the alien had his permanent residence in New Jersey since witnesses were available in that state, and there was a likelihood that the alien's lawyer, who had detailed knowledge of the circumstances in his case, could be present for a hearing in New Jersey.¹⁷

Contents of Order to Show Cause

The Order to Show Cause alleges certain facts which lead to the charge against the respondent while the charge contains the specific section of law under which the respondent is alleged to be deportable. The facts recited in the Order to Show Cause must give adequate notice to the alien of the manner in which he is alleged to have become deportable. Thus in one case, when the Order to Show Cause stated that the respondent was born in the United States and that he was now an alien, but the order did not describe the manner in which the respondent was alleged to have lost his citizenship,

¹² 8 CFR Par. 242.1 (b). ¹³ See, *Cheung v. INS*, 418 F.2d 460 (D.C. Cir. 1969).

¹⁴ 8 CFR Par. 242.13. ¹⁵ *Idem*. ¹⁶ See, *La Franca v. INS*, F.2d 686, 689 (2d Cir. 1969).

¹⁷ See, *Chlomos v. INS*, 516 F.2d 310 (3d Cir. 1975).

the deportation order was held to be invalid.¹⁸ Not only must the factual allegations be adequate to give notice to the respondent of the manner in which it is alleged he has become deportable, but the charge, that is the section of law under which it is claimed that the respondent is deportable, must conform to the facts alleged; if the charge cites the wrong section of the statute, it is defective, and the case will be remanded.¹⁹ In one case where the respondent challenged a deportation order in his case on the ground that the charge in the Order to Show Cause was vague and involved an unconstitutional delegation, the Court said that such claim was premised on the presumption that the statute as it related to deportation is penal and that criminal standards should therefore be applied. The court disposed of this claim by repeating the statement that a deportation proceeding is not a criminal prosecution, and that in cases where the pleading is vague or uncertain, a more definite or precise statement could be obtained.²⁰

Conduct of the Hearing

The hearing is recorded verbatim, in most cases through an electronic recording device, although in a few locations reporters are used.²¹ Statements may be made off the record with the permission of the Immigration Judge.²² Sometimes these off-the-record discussions are significant in the ultimate outcome of the case. When this happens, the Immigration Judge should summarize what went on during the discussion off the record, and should indicate concisely any agreements that may have been reached during such discussion. Should the Immigration Judge, through oversight, fail to state for the record the contents of a significant off-the-record discussion, it is appropriate for counsel to request the Immigration Judge to do so.

I recently referred to a deportation case in which the court stated that additional, clarifying information could be requested when the pleadings were vague. There is, however, no provision for discovery or for a bill of particulars, either in the statute or in the regulations. Nevertheless, the appearance of witnesses or the production of documents can be required through issuance of a subpoena, which may be requested by either party, or issued by the Immigration Judge upon his own initiative.²³ The party applying for the subpoena must show, as a condition precedent to the issuance of the document, either in writing or at the proceeding, what he expects to prove by the witnesses or the documentary evidence requested, and must show that a diligent effort has been made, without success, to produce the desired witnesses or documents; he must also show that the

¹⁸ See, *MacLeod v. INS*, 327 F.2d 453 (9th Cir. 1964).

¹⁹ See, *Matter of P*, 9 I & N Dec. 368 (1961).

²⁰ See *Pilapil v. INS*, 424 F.2d 6, 10 (10th Cir., 1970). ²¹ 8 CFR Par. 242.15.

²² *Idem.* ²³ 8 CFR Par. 287.4 (a) (2).

evidence is essential to his case.²⁴ Thus, in one case where the respondent claimed to be a derivative citizen, the Board of Immigration Appeals upheld the denial of a subpoena of the respondent's father on the ground that there had been no showing that the testimony of the father was "essential", since the respondent had failed in other respects to present a substantial claim to derivative citizenship.²⁵

Another method for securing additional testimonial evidence is through the use of depositions. Depositions may be ordered by the Immigration Judge either at his own instance or on application of either party. They will be ordered if the Immigration Judge is satisfied that a witness is not reasonably available at the place of hearing, and that his testimony or other evidence is essential. Deposition testimony is given under oath or affirmation and is recorded verbatim; in the United States examination takes place before an Immigration Judge. Abroad, examination is preferably before an officer of the Immigration and Naturalization Service, in localities where he is authorized to interview witnesses in deportation proceedings; in other places examination is preferably before a United States Consular officer. The officer presiding at the taking of the deportation notes, but does not rule on objections, and he does not comment on the admissibility of evidence or on the credibility and demeanor of witnesses.²⁶

Pretrial Conferences

Although neither the statute nor the regulations make any provision for pretrial conferences, they are extremely useful devices which are appropriate in many cases. The pretrial conference may take place immediately prior to or well in advance of the date set for the hearing, whether a pretrial conference has been held, and if not, encourage the parties to engage in such a conference. This is not a universal practice, however, and it has been suggested that possibly the pretrial conference should be formalized by including it in the regulations as a requirement. Whether or not formalization of such conferences is desirable, it is unquestionably true that they will assist both sides by frequently resulting in stipulations which will shorten the hearing. Through this device many documents that the alien seeks and perhaps some the Government seeks will be made available prior to the hearing. Consultation by counsel for the alien with the Trial Attorney prior to the formal hearing may allow counsel to obtain advance knowledge of evidence in the possession of the Service and will provide an opportunity for counsel to examine the content of any depositions that may have been taken, prior to the scheduling of a hearing or rehearing.

²⁴ *Idem.*

²⁵ See, *Matter of Vergera*, 15 I&N Dec., I.D. 2408, 1975. ²⁶ 8 CFR Par. 242.14 (1).

Conduct of the Hearing

The Immigration Judge will first determine whether an interpreter is needed. When an interpreter is used, he or she may be an employee of the Service, or a non-Governmental employee working under contract with the Service. In the Washington, D.C., area, the interpreters are frequently employees of the Department of State. In some locations, when an interpreter is required for a language rarely spoken in the United States, such as Urdu or Tagalog (a dialect spoken in the Philippines), the alien may be requested to bring his own interpreter. In such cases the interpreter will be sworn before the hearing.²⁷

It may be noted at this point that deportation hearings are open to the public. However, the Immigration Judge may direct that the general public or particular individuals shall be excluded from the hearing in a specific case, for the purpose of protecting witnesses, respondents, or the public interest. While those cases which generate much publicity, and are expected to attract a large number of spectators, are usually held in courtrooms larger than the customary courtroom, it may still be necessary to limit the number of those in attendance, and in such cases priority is given to the press over the general public.²⁸

If the alien appears without an attorney, he is advised of his right to be represented by counsel of his own choice at no expense to the Government. The respondent may be represented either by an attorney or by a representative qualified under the regulations.²⁹ In this connection it may be noted that an attorney need not be a member of the bar of the state in which the deportation proceedings are being conducted. An attorney in good standing of the bar of any state may practice in immigration proceedings, regardless of where those proceedings are taking place.³⁰ A representative of a non-profit religious, charitable, social service, or similar organization recognized as such by the Board of Immigration Appeals may also appear on behalf of the alien.³¹ The alien may also be represented by certain other persons, who are listed in Section 292.1 of Title 8 of the Code of Federal Regulations.

At any rate, if you agree to represent an alien at a deportation hearing, one of your first actions should be to file your appearance. This is done on Form G-28.³² Once you have filed that Notice of Appearance, the regulations require that you receive documents such as notices or motions served upon the alien.³³

If the alien appears without counsel, he is advised of his right to be

²⁷ 8 CFR Par. 242.12. ²⁸ 8 CFR Par. 242.16 (a). ²⁹ 8 CFR Par. 242.10.

³⁰ 8 CFR Par. 292.1 (a) (1); 8 CFR Par. 1.1 (f).

³¹ 8 CFR Par. 292.1 (a) (4); 8 CFR Par. 292.2 (a).

³² 8 CFR Par. 292.4 (a). ³³ 8 CFR Par. 292.5 (a).

represented and asked whether he wishes to secure representation. If the answer is in the affirmative, he will be granted a continuance for a reasonable period to secure the services of an attorney or representative. If the alien indicates that he would like to be represented by counsel, but does not have funds, he will, in many areas of the country, be referred to a local organization which assists aliens, which may be a legal aid society, a social service or religious organization, or some other group. When the alien has been given a reasonable opportunity and fails to obtain counsel ³⁴ or if counsel has been given sufficient notice and then fails to appear ³⁵ the hearing may proceed without counsel.

Opening of Hearing

After the matter of representation has been determined, the Immigration Judge will inform the alien that he will have the right to examine any evidence that may be offered against him and to object to any such evidence; the right to present evidence in his own behalf; the right to cross-examine any witnesses that may be produced by the Government. The Immigration Judge will then place the respondent under oath, read and explain in non-technical language the factual allegations and the charges in the Order to Show Cause and enter the Order to Show Cause as the first exhibit in the Record. This is probably a good point to note that the only document which the Immigration Judge has prior to the hearing is the Order to Show Cause itself. Files relating to an alien are divided into two categories: One is the "A" or administrative file; the second is the record file. The Immigration Judge does not see the administrative file at any time. The administrative file contains reports of investigations, sworn statements, and other material. The record file, at this stage of the proceedings, contains only the Order to Show Cause.

The respondent is asked whether he admits or denies the factual allegations and deportability under the charges stated in the Order to Show Cause. ³⁶ Several years ago a new procedure was inaugurated to handle cases which are not contested. These cases are now designated as part of the special calendar. The procedure was started in New York City but it is now in use throughout the country. In this procedure the explanation of the nature of the proceeding and the reading of the charges as well as an explanation of the respondent's rights, are waived by the respondent, through his counsel. It has been held that the waiver of the reading of the charges to the alien does not deprive him of a fair hearing where he and counsel are both familiar with the charges. ³⁷ When a case is placed on the special calendar

³⁴ See, *Bisaillon v. Hogan*, 257 F.2d 435 (9th Cir. 1958). Cert. den. 358 U.S. 872.

³⁵ See, *Giaimo v. Pederson*, 289 F.2d (6th Cir. 1961). * 8 CFR Par. 242.16.

³⁷ See, *Guerrero de Nodahl*, 407 F.2d 1405 (9th Cir. 1969).

and it is found that there are issues to be resolved which make the summary hearing inappropriate, the case will be returned to the regular calendar for a full hearing. Even in cases that are not placed on the special calendar, counsel for the alien can shorten the proceedings considerably by waiving the usual preliminary explanations and the reading of the charges. An Order to Show Cause may, for example, contain ten or twelve allegations of fact and a charge upon which deportability is predicated. Counsel may waive the reading of the factual allegations and the charges on behalf of his client admit all of the allegations except one and may deny deportability. The parties may then quickly attack the one issue which will be dispositive of the case, the issue raised in the one allegation which is denied by the respondent.

If the respondent admits the allegations of fact and concedes deportability and no issues remain to be decided, the Immigration Judge may conclude that deportability has been established. On the other hand, if the respondent denies any of the allegations of fact, or denies deportability, or contends that the Order to Show Cause is defective, a Trial Attorney will be assigned to present the Government's case.³⁸

While most Trial Attorneys are, in fact members of the Bar, there is no requirement that they be attorneys, and in some instances the Government's case is presented by an Acting Trial Attorney, who is not a lawyer. In one case counsel for the alien contended that he was deprived of a fair hearing because the Acting Trial Attorney, was not a member of the Bar. Counsel contended that in these adversary proceedings the alien's attorney may be reluctant to bring the full weight of his expert training and legal knowledge against a layman without such advantages. Counsel's second argument was that in view of the many fine issues presented in deportation cases, the lack of any real competition between the ill-matched Service representative and the superbly equipped attorney for the alien may induce a feeling of complacency on the part of the attorney, with the result that the alien's case may not be adequately presented. Counsel's third contention was that the Immigration Service, in appearing by a Trial Attorney who was not actually a lawyer, may downgrade the whole proceeding by the subtle implication that its case is so "cut and dried" that it does not call for a trained attorney, and that the Immigration Judge may be subconsciously influenced by this suggestion in arriving at his decision. The Board of Immigration Appeals rejected all three contentions and held that the alien had not been deprived of a fair hearing.³⁹

If the Trial Attorney lodges an additional charge at the hearing, the Immigration Judge must advise the respondent who is not represented by counsel that he may be so represented and also that he may have a reasonable

³⁸ 8 CFR Par. 242.16 (d). ³⁹ See, *Matter of Reyes-Comez*, 15 I&N Dec. I.D. 2179, 1973.

time to meet the additional factual allegations and charges.⁴⁰ The practice of lodging additional charges at the hearing has received judicial sanction, and has been described as fair, when the respondent is given sufficient time to meet the new charges.⁴¹ During the hearing the Immigration Judge is empowered, by statute, to present and receive evidence, interrogate, examine and cross-examine the alien or witnesses.⁴² Cross-examination by the Immigration Judge, to clarify the facts, or to determine whether prejudice exists on the part of witnesses, has been upheld as proper by the Board of Immigration Appeals.⁴³ While the matter of discretionary relief from deportation will be covered in greater detail by our next speaker, I think it is appropriate to note at this point that it is the duty of the Immigration Judge to inform the respondent of his apparent eligibility for discretionary relief,⁴⁴ and that any application for discretionary relief must be made during the hearing. The application for such relief does not constitute a concession of alienage or deportability in any case in which the respondent does not admit alienage or deportability.⁴⁵ The Immigration Judge may determine deportability only upon evidence of record⁴⁶ and the statute provides that no decision or deportability shall be valid unless it is based upon reasonable, substantial and probative evidence.⁴⁷ The Supreme Court has stated that the determination of deportability and alienage can be based only on clear, convincing and unequivocal evidence.⁴⁸

Place of Deportation

Before closing the hearing, the Immigration Judge will ask the respondent to designate a country of deportation that will be applicable if deportation should be ordered.⁴⁹ After the respondent has made such a designation the Immigration Judge may inform the respondent of an alternative country or countries to which the respondent will be deported if the country designated by him refuses to accept him.⁵⁰ If the respondent feels he would be subject to persecution on account of race, religion, political opinion, nationality or membership in a particular social group, he may apply for temporary withholding of deportation. The respondent may have ten days to submit his application for withholding of deportation and although there is no prescribed form, the application must include the respondent's statement setting forth the reasons to support his request. There is also a fee of \$25 in

⁴⁰ 8 CFR Par. 242.16 (d).

⁴¹ See, *Foundoulis v. Lehmann*, 255 F.2d 104 (6th Cir. 1958).

⁴² See, 242 (b) I&N Act; 8 U.S.C. Par. 1252 (b). ⁴³ *Matter of J.*, 8 I&N Dec. 568.

⁴⁴ 8 CFR Par. 242.17 (a). ⁴⁵ 8 CFR Par. 242.17 (d).

⁴⁶ Sec. 242 (b), I&N Act; 8 U.S.C. Par. 1252 (b) (4).

⁴⁷ Sec. 242 (b) (4), I&N Act; 8 U.S.C. Par. 1252 (b) (4).

⁴⁸ See, *Woodby v. INS*, 385 U.S. 276, 285 (1966). ⁴⁹ 8 CFR Par. 242.17 (c). ⁵⁰ *Idem*.

connection with the application. In trial, the burden of proof is upon the respondent to establish that he would be subject to persecution as claimed.⁵¹

Decision of the Immigration Judge

The Immigration Judge's decision may be given orally or in writing. If deportability has been determined on the admissions of the respondent and the only application has been for voluntary departure the Immigration Judge may enter a summary decision on Form I-38 if deportation is ordered or on Form I-39 if voluntary departure is granted, with an alternate order of deportation.⁵² In cases where deportability has not been determined on the pleadings, the decision of the Immigration Judge will include a discussion of the evidence concerning deportability as well as a discussion of the evidence pertaining to any application for discretionary relief, and the reasons for granting or denying any request for such relief.⁵³

Appeals

When the Immigration Judge gives an oral decision, or if he enters a summary decision on Form I-38 or I-39, he is required to notify the respondent of his right to appeal and to furnish the Notice of Appeal form, Form I-290 A, to the alien.⁵⁴ An appeal may be taken by either party within ten days of the stating of an oral decision or the service of a summary decision of Form I-38 or Form I-39, or within thirteen days of the mailing of a written decision.⁵⁵

Although any appeal from a decision in a deportation or exclusion proceeding requires a \$50 fee,⁵⁶ the fee may be waived when the alien is unable to pay it and files with his Notice of Appeal an affidavit stating his belief that he is entitled to redress and that he is unable to pay the required fee.⁵⁷ It is important to note that the reasons for the appeal must be specifically stated to avoid summary dismissal by the Board of Immigration Appeals.⁵⁸

Exclusion Proceedings

In deportation proceedings, the Government seeks to expel from the United States any alien who is already within the country. In exclusion proceedings, on the other hand, the objective is to determine whether an alien seeking admission to the United States shall be admitted or excluded. From a

⁵¹ Sec. 243 (h), I&N Act; 8 U.S.C. Par. 1253 (h); 8 CFR Par. 242.17 (c). Fees for various applications are listed in 8 CFR Par. 103.7 (b).

⁵² 8 CFR Par. 242.18 (b). ⁵³ 8 CFR Par. 242.18 (a). ⁵⁴ 8 CFR Par. 242.19 (b), (c).

⁵⁵ 8 CFR Par. 242.21. ⁵⁶ 8 CFR Par. 103.7 (b). ⁵⁷ 8 CFR Par. 3.3 (b).

⁵⁸ 8 CFR Par. 3.1 (d) (1-2); *Matter of Holguin*, 13, I&N Dec. 423.

statistical viewpoint, exclusion hearings constitute only a small proportion of the workload of Immigration Judges; in the fiscal year 1977, for example, exclusion hearings were completed in the cases of about 3,000 aliens, whereas deportation hearings were completed in the cases of approximately 57,000 aliens. However, it is obvious that the decision in an exclusion proceeding is just as important to the subject of that proceeding as is the decision in the deportation case to the alien in whose case the deportation proceedings are being held.

There are many similarities and many differences between exclusion hearings and deportation hearings. Let us first deal with the differences. The degree of procedural due process accorded an alien in exclusion proceedings is less than that accorded an alien in deportation proceedings. The theory behind this distinction is that a person already in the United States is entitled to the full protection of the due process clause of the Fifth Amendment of the Constitution, and the Supreme Court so held as long ago as 1903.⁵⁹ On the other hand, an alien seeking admittance to the United States is deemed to be entitled only to that degree of due process accorded him by Congress. In that connection, the following statement, from a decision of the Supreme Court rendered in 1950⁶⁰ is quoted frequently: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned". However, an alien who has acquired permanent residence in the United States is entitled to the full protection of procedural due process if his right to reenter this country should be questioned in exclusion proceedings.⁶¹ In a deportation proceeding the burden of proof is upon the Government to establish deportability by clear, convincing and unequivocal evidence,⁶² but in an exclusion proceeding the burden of proof is upon the alien to show that he is admissible to the United States,⁶³ unless he is a returning resident, in which case the burden is upon the Government to show that the alien is excludable.⁶⁴

While a deportation hearing is open to the public, an exclusion hearing must be kept separate and apart from the public, by statutory mandate.⁶⁵ However, the alien may waive this provision of the statute and request that the public be permitted to attend.⁶⁶ In addition to counsel, the alien may have one friend or relative present.⁶⁷

The possession of a visa issued by a United States Consul does not insure that the holder of the visa will be admitted to the United States.⁶⁸ When the

⁵⁹ See, *Japanese Immigrant Case*, 189 U.S. 86, 100 (1903); See also, *Sung v. McGrath*, 339 U.S. 33, (1950). ⁶⁰ See, *Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

⁶¹ See, *Chew v. Colding*, 344 U.S. 590 (1953). ⁶² See, *Woody v. INS*, 385 U.S. 276 (1966).

⁶³ Sec. 291, I&N Act, 8 U.S.C. Par. 1361.

⁶⁴ See, *Chew v. Rogers*, 257 F.2d 606 (D.C. Cir. 1958); *Matter of Becerra-Miranda*, 12 I&N Dec. 358 (1967). ⁶⁵ Sec. 236, I&N Act; 8 U.S.C. Par. 1226. ⁶⁶ 8 CFR Par. 236.2 (a).

⁶⁷ *Idem*. ⁶⁸ Sec. 221 (h), I&N Act; 8 U.S.C. Par. 1201 (h).

arriving alien does not appear to the examining officer at the port of arrival to be clearly beyond a doubt entitled to land, the alien is detained for further inquiry to be conducted by an Immigration Judge.⁶⁹ You will recall that the document which initiates a deportation proceeding, the Order to Show Cause, must be specific in its allegations of fact, and in citing the sections of law under which the alien is charged with deportability. In an exclusion proceeding, on the other hand, the Notice of Hearing⁷⁰ is couched in general terms concerning the reasons the alien is believed to be inadmissible. Inquiry at the hearing is not restricted to the grounds set forth in the Notice of Hearing and other possible grounds for inadmissibility may be ascertained and used as a basis for decision. However, should new issues develop during the course of the hearing, fairness dictates that the applicant for admission be informed of the new charges and be given an opportunity to meet them. In an exclusion proceeding the alien cannot apply for certain forms of discretionary relief that are available to him in deportation proceedings. He may not apply for suspension of deportation or voluntary departure and if ordered excluded he may not select the country of deportation, but he must be returned to the country from which he came. At present, he may not apply for temporary withholding of deportation, which is available to the alien in deportation proceedings. However, regulations are now being prepared which would accord the alien in exclusion proceedings the right to have a hearing before an Immigration Judge if the alien seeks political asylum. It is expected that these regulations will be published in the near future.

Procedure at the Hearing

In many respects the exclusion hearing is similar to the deportation hearing: The alien has the right to be represented by counsel of his own choice; to examine and object to evidence presented by the Government; to present evidence on his own behalf; and to cross-examine witnesses.⁷¹ The decision of the Immigration Judge may be oral or written⁷² and must be based upon the record made at the hearing, which is a verbatim record including all written orders, motions, appeals and other papers filed in the proceedings.⁷³ When the Immigration Judge's decision is rendered orally, the applicant for admission cannot reserve the right of appeal, but must state "then and there" whether he wishes to appeal, and submit a completed appeal form.⁷⁴ The applicant may have ten days to file a brief; and if the Immigration Judge's decision is written, the alien applicant has thirteen days after the

⁶⁹ Sec. 235 (b), I&N Act; 8 U.S.C. Par. 1225 (b).

⁷⁰ Form I-122. ⁷¹ 8 CFR Par. 236.2 (a). ⁷² 8 CFR Par. 236.2 (b), (c).

⁷³ 8 CFR Par. 236.2 (e). ⁷⁴ Form I-290 A; 8 CFR Par. 236.5 (b).

mailing of the decision within which to submit his appeal.⁷⁵ It is usually advantageous to the alien to have his case determined in deportation rather than in exclusion proceedings. Therefore, a permanent resident who departs from the United States for a brief visit outside the country may challenge the propriety of exclusion proceedings where the Government contends that his original entry for permanent residence was gained by fraud. In one such case the court stated that when evidence appears, during an exclusion proceeding, that the alien has been granted permanent resident status and is seeking to return to the United States after a brief visit outside the country, the exclusion proceedings shall be terminated. If there is evidence that the alien may have fraudulently secured his resident status the Immigration Service can thereupon institute deportation proceedings against him.⁷⁶ That decision, in turn, is based upon the Supreme Court's ruling in the landmark case of *Rosenberg v. Fleuti*, 374 US 449, at 462. In that case the Supreme Court stated that an innocent, casual and brief excursion by a resident alien outside this country's borders may not have been intended as a departure disruptive of his resident alien status and therefore may not subject him to the consequences of an entry into the country on his return. Although it is generally advantageous to have an alien's case determined in deportation rather than in exclusion proceedings, there is one instance where this is not true. If ordered deported, he is permanently barred from returning to the United States without the permission of the Attorney General,⁷⁷ whereas if he is ordered excluded and deported he needs the permission of the Attorney General to reenter the United States only if he wishes to do so within one year.⁷⁸

Almost all Immigration Judges welcome the presence of competent counsel or knowledgeable representation appearing on behalf of the alien. Such an attorney or representative expedites completion of the case by focusing attention on the issues that are actually significant to disposition of the case, and the assistance of able counsel in a case with sympathetic and appealing features helps to assure the Immigration Judge that all the factors favorable to the alien have been fully presented.

⁷⁵ 8 CFR Par. 236.5 (b).

⁷⁶ See, *Maldonado-Sandoval v. INS*, 518 F.2d 278, 281 (9th Cir. 1975).

⁷⁷ Sec. 212 (a) (17), I&N Act; 8 U.S.C. Par. 1182 (a) (17).

⁷⁸ Sec. 212 (a) (16), I&N Act; 8 U.S.C. Par. 1182 (a) (16).

Relief From Deportation: Discretion and Waivers

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SINCE the early days of immigration law enforcement in this country, courts and commentators alike have condemned the harsh results that often flow from our deportation laws.¹ The immigration statutes themselves are highly technical and exceedingly complex, so that aliens innocent of any intentional wrongdoing can readily become enmeshed in deportation proceedings. An alien whose original entry was unlawful or whose presence here may have become unlawful after a perfectly legal original entry may remain undetected for years. Such an alien may have established deep roots here by the time his unlawful presence is discovered and deportation proceedings are begun. The absence of any meaningful statute of limitations only aggravates the opportunities for hardship.

Through the years, various forms of relief from the rigors of deportation have been developed by imaginative administrators, Congressional enactments, and activist judges. In the vast majority of deportation cases today, the alien's deportability is conceded and the issue revolves about his quest for relief from deportation. It is safe to say that there is now no type of case that is remediless, provided that the requisite degree of hardship can be proved.

Relief from deportation can take three different forms: 1) mandatory relief, where the statute forbids the expulsion of an otherwise deportable alien on the happening of a specified event; 2) purely discretionary relief, where an INS enforcement official in the exercise of prosecutorial discretion decides not to start proceedings against an otherwise deportable alien; and 3) statutory discretionary relief, where the statute lays down specified eligibility requirements and then leaves it to the administrative tribunals to determine

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¹ See, e.g., *Lennon v. INS*, 527 F.2d 187, 193 (2d Cir. 1975): "...in severity it surpasses all but the most Draconian criminal penalties."

in the exercise of administrative discretion whether or not relief shall be granted to an alien who has met those requirements.

MANDATORY RELIEF

Fraud Cases

Under Sect. 241 (a) (1) of the Immigration and Nationality Act (INA or Act), an alien is deportable if at the time of entry he was inadmissible under the law then existing. Under Sect. 212 (a) (19), an alien is inadmissible if he has obtained his immigrant visa by fraud. Under Sect. 212 (a) (20), an alien immigrant is inadmissible without a valid visa. Thus, an immigrant who was admitted with a fraudulent visa is deportable because he was inadmissible at entry, and inadmissibility can be charged under either or both Sect. 212 (a) (19) and Sect. 212 (a) (20). There is no statute of limitations and deportation proceedings can be started no matter how many years have elapsed since entry.

However, Sect. 241 (f) of the Act makes the foregoing inapplicable in the case of "an alien otherwise inadmissible at the time of entry who is the spouse, parent or a child of a United States citizen or of an alien unlawfully admitted for permanent residence", this provision does not make relief from deportation depend on the favorable exercise of administrative discretion. The statute itself bars the deportation of any alien who fits within its terms.

Where visa fraud is the operative element of the Service's case against the alien Sect. 241 (f) applies even though the Service has predicated inadmissibility on a "no valid visa" charge under Sect. 212 (a) (20) rather than a "fraudulent visa" charge under Sect. 212 (a) (19) [*Errico v. INS.* 385 U.S. 214 (1966)]² Where an alien obtained admission without inspection as an alien by fraudulently claiming to be a U.S. citizen, and deportability was charged for entry without inspection under Sect. 241 (a) (2), however, it was held that Sect. 241 (f) does not bar deportation [*Reid v. INS.* 420 U.S. 619 (1975)]³

Language used in the *Reid* opinion has given rise to a conflict among the circuits as to whether, in a fraudulent visa case, the Service can now preclude the applicability of Sect. 241 (f) by the simple expedient of using the "no valid visa" charge under Sect. 212 (a) (20) in addition to or to the exclusion of the "fraudulent visa" charge under Sect. 212 (a) (19). Such manipulation by the Service was held ineffective to bar relief under Sect. 241 (f) in *Persaud v. INS.* 537 F.2d 776 (3rd Cir. 1976)⁴ and *Cacho v. INS.* 547 F.2d 1057 (9th Cir. 1976).⁵ The Fifth Circuit has ruled the other way [*Escobar-Ordonez v.*

² Digested in *Interpreter Releases*, 43:346, 1966.

³ Digested in *Interpreter Releases*, 52:65, 1975.

⁴ Digested in *Interpreter Releases*, 54:12, 1977.

⁵ Digested in *Interpreter Releases*, 54:214, 1977.

INS, 526 F.2d 969 (1976)].

Sect. 241 (f) does not bar deportability based on some independent statutory ground not linked to the fraud [*Loos v. INS*, 407 F.2d 651 (7th Cir. 1969) (ineligible to citizenship for remaining abroad to evade military service)]; [*Jolley v. INS*, 441 F.2d 1245 (5th Cir. 1971) (same)]; [*Gambino v. INS*, 419 F.2d 1355 (2d Cir. 1970) (stowaway)]; [*Milande v. INS*, 484 F.2d 774 (7th Cir. 1973) (remained longer than permitted after nonimmigrant entry)]; [*Preux v. INS*, 484 F.2d 396 (10th Cir. 1973) (same)] and [*Cacho v. INS*, 547 F.2d 1057 (9th Cir. 1976) (no labor certification)].

Criminal Cases

Under Sect. 241 (a) (4) of the Act, aliens convicted of crimes involving moral turpitude under certain circumstances are made subject to deportation. However, Sect. 241 (b) of the Act renders the deportation provision inapplicable where 1) the alien has been granted a full and unconditional pardon by the President of the U.S. or the Governor of the state; or 2) the sentencing court when first imposing sentence or within 30 days thereafter recommends to the Attorney General that the alien not be deported, after prior notice to the INS and the prosecuting authorities. By the specific terms of the statute neither a pardon nor a judicial recommendation against deportation affects deportability under Sect. 241 (a) (11) based on a narcotics violation. However, where the narcotics conviction is expunged under the Federal Youth Corrections Act [*Matter of Berker*, Int. Dec. 2511 (BIA 1976)]⁶ or First Offender Act or their state counterpart, deportability is dissolved [*Matter of Werk*, Int. Dec. 2589 (BIA 5 1977)].⁷

An untimely judicial recommendation against deportation is ineffective, even when made *nunc pro tunc* [*Velez-Lozano v. INS*, 463 F.2d 1305 (D.C. Cir. 1972)].⁸ [*Marin v. INS*, 438 F.2d 932 (9th Cir. 1971)]. However, where the failure to give the notice to the INS is the fault of the court, this can be later corrected. [*Cerujo v. INS*, 570 F.2d 1323 (7th Cir. 1978)].

Asylum Cases

Sect. 243 (h) of the Immigration and Nationality Act authorizes the Attorney General to withhold deportation of an alien to any country in which in the Attorney General's opinion, the alien would be subject to persecution on account of race, religion or political opinion. While the burden of proof on this issue is on the alien, where he carries his burden he does more than

⁶ Digested in *Interpreter Releases*, 54: 149, 1977.

⁷ Digested in *Interpreter Releases*, 54: 231, 1977.

⁸ Digested in *Interpreter Releases*, 50: 11, 1973.

establish mere statutory eligibility for a form of relief which can still be denied by the Attorney General in the exercise of administrative discretion. In such circumstances, it seems clear that the statute contemplates that deportation to the persecuting country shall be withheld. While one decision intimated that withholding could be denied in the exercise of discretion on the basis of factors unrelated to the persecution claim [*Matter of Liao*, 11 I&N Dec. 113, 119 (BIA 1965)], this was later rejected as dictum in *Matter of Dunar*, 14 I&N Dec. 310, 323 (BIA 1973).⁹ As the Service conceded in *Matter of Dunar*, in actual practice there never has been a case in which deportation has been directed to a country in the face of a finding by the Attorney General that the alien would be likely to face persecution there.

PROSECUTORIAL DISCRETION

Sect. 241 (a) of this Act sets up a number of categories of aliens who "shall, upon the order of the Attorney General, be deported". Until relatively recently, the INS focused on the word "shall" and regarded it as a command to start deportation proceedings against all aliens who fit within the enumerated deportable classes. In *Pignatello v. Attorney General*, 350 F.2d 719 (2d Cir. 1965), Judge (now Justice) Thurgood Marshall pointed out that a certain degree of prosecutorial discretion is permitted, since the statute calls for the deportation of only those aliens whom the Attorney General orders deported. Prosecutorial discretion is now exercised by the Service in its "deferred action" program. Originally called the "nonpriority program" and considered solely an internal administrative arrangement, the availability of this remedy was made public largely as the result of the litigation in the widely publicized case of John Lennon.¹⁰

Under the Service's published Operations Instructions 103.1 (a) (1) (ii), prosecutorial discretion can be exercised not to proceed against a deportable alien where it is determined "that adverse action would be unconscionable because of the existence of appealing humanitarian factors". A recommendation that a case be placed in a "deferred action" category is made to the Regional Commissioner on Form G-312, which is personally signed by the District Director. The following factors are considered; 1) advanced or tender age; 2) many years presence in the U.S.; 3) physical or mental condition requiring care or treatment in the U.S.; 4) family situation in the U.S. - effect of expulsion and 5) criminal, immoral or subversive activities or affiliations - recent conduct. If the Regional Commissioner approves

⁹ Digested in *Interpreter Releases*, 50: 269, 1973.

¹⁰ For further details, See, Wildes, "The Nonpriority Program of the Services". *Interpreter Releases*, 50: 25, 1976; Wildes, "The Nonpriority Program of the INS Goes Public". *San Diego Law Review*, 42, 1976.

the District Director's recommendation, the alien is appropriately notified. Even after deportation proceedings have been started, they can be terminated as improvidently begun under 8 CFR 242.7 (a), and this can be done even after a deportation order has been entered [*Matter of Vizcarra-Delgadillo*, 13 I&N Dec. 51 (BIA 1968)].

Prosecutorial discretion in deportation proceedings is exercised only by INS enforceable officials. Neither Immigration Judges nor the Board of Immigration Appeals (BIA) have been given this power [*Lopez-Telles v. INS*, 564 F.2d 1302 (9th Cir. 1977)].¹¹ The courts do not review the exercise of prosecutorial discretion, but one court has intimated that it would "not condone selective deportation based upon secret political grounds"¹² (*Lennon v. INS*, 527 F.2d 187, 193 (2d Cir. 1975))¹² Reviewing courts are becoming increasingly aware of the remedy now available by way of prosecutorial discretion. While they themselves are unable to grant relief against hardship, some courts have withheld issuance of their mandates for a fixed period to permit the alien to seek "deferred action" status from the District Director [*See, e.g., Vergel v. INS*, 536 F.2d 755 (8th Cir. 1976)]; [*David v. INS*, 548 F.2d 219 (8th Cir. 1977)].

STATUTORY DISCRETIONARY RELIEF

General Considerations

Most cases involving relief from deportation arise under various provisions of the Immigration Act containing specific eligibility requirements and authorizing the Attorney General, in his discretion, to grant or deny the relief. In each case, the alien has the burden of proof on two issues: 1) that he satisfies the statutory eligibility requirements; and 2) that he merits the favorable exercise of administrative discretion. Notwithstanding this two-pronged test, the adjudicating body can bypass the question of eligibility altogether and deny relief solely in the exercise of administrative discretion [*INS v. Bagamasbad*, 429 U.S. 14 (1976)]¹³

Most of the statutory provisions contain a requirement that the alien establish that he has been a person of good moral character for a specified period of time. A negative definition of good moral character is set forth in Par. 101 (f) of the Act, which specifies eight types of circumstances which preclude a showing of good moral character. Where good moral character is not a statutory prerequisite, it can still be considered as an element in exercising administrative discretion [*Matter of Francois*, 10 I&N Dec. 168 (BIA 1963)].

¹¹ Digested in *Interpreter Releases*, 55: 63, 1978.

¹² Digested in *Interpreter Releases*, 52: 401, 1975.

¹³ Digested in *Interpreter Releases*, 54: 166, 1977.

Each form of relief is governed by a different statutory provision, and each has its own distinctive eligibility requirements. Various forms of relief can be sought in the alternative by the same alien.

Voluntary Departure

This is the most common form of discretionary relief from deportation. It permits a deportable alien to depart the United States at his own expense to any country of his choice without the entry of a deportation order and its ensuing disabilities. Voluntary departure paves the way for the alien's ready return to the U.S. once he obtains the required visa, without the need for acquiring the advance permission from the Attorney General required of deportees by Sect. 212 (a) (17) of the Act and without exposure to criminal prosecution for a felony under Sect. 276 for seeking to reenter without such advance permission. There are two types of voluntary departure, prehearing voluntary departure, and voluntary departure after hearing.

Prehearing Voluntary Departure. Under Sect. 242 (b) of the INA, an alien who admits that he is deportable, and who is not deportable under the most serious charges [those contained in Sect. 241 (a) (4), (5), (6), (7), (11), (12), (14), (15), (16), (17) or (18)], can be permitted to depart without the institution of deportation proceedings. Departure is usually at the alien's expense, but if he is financially unable to do so it may be at the Government's expense. This is the type of voluntary departure widely used along the Mexican border in the cases of recent illegal entrants across the border.

Voluntary Departure After Hearing. Under Sect. 244 (e) of the INA, the Attorney General may, in his discretion, grant voluntary departure to any alien in deportation proceedings who is not deportable on the more serious charges [those above enumerated under Sect. 242 (b)]. If he is deportable on the more serious grounds, he can qualify for voluntary departure only if he is also eligible for suspension of deportation under Sect. 244 (a) (2) of the Act, which is discussed below. In the less serious cases, to be eligible the alien must establish good moral character for at least the preceding five years. Departure must be at the alien's own expense. Under 8 CFR 244.1 he must have the immediate means with which to depart promptly; if he doesn't have the needed fare, he is ineligible. Under 8 CFR 242.17 (b), the application is made at the deportation hearing. No special form is required, the application is usually made orally, and there is no fee.

Exercise of Discretion. The following are among the factors which are considered in exercising discretion: If the alien entered as a crewman, was he a bonafide crewman who had previously made a number of entries and departures as such, or was this his first trip? Had he previously been granted voluntary departure and thereafter reentered illegally? Did he have a

preconceived intent to enter as a nonimmigrant and then remain longer than permitted? Did he use the services of a commercial smuggler in effecting entry? Did he abscond and remain in hiding when sought by INS? Did he try to escape when questioned by INS officers? Did he attempt to deceive the INS during the course of the proceedings? How long has he been here and what are his family ties here? What hardships would be involved if he was deported?

Time for Departure. If voluntary departure is granted, the time within which the alien must depart is fixed by the Immigration Judge. Ordinarily 30 days are allowed. The Immigration Judge's order usually provides for the automatic entry of a deportation order without further notice or proceedings if the alien fails to depart within the allotted time or an authorized extension. Under 8 CFR 244.2, only a District Director can grant an extension of voluntary departure time and his decision is not appealable. In a proper case, however, an Immigration Judge or the BIA can grant a motion to reopen and make a new voluntary departure grant, but in such case the departure time is fixed by the District Director [*Matter of Yeung*, 13 I&N Dec. 528 (BIA 1970)]. A proposed amendment to 8 CFR 244.1 would permit the Immigration Judge on reopening to fix the time on making a new grant of voluntary departure, 42 F.R. 63427 (December 16, 1977). If an alien fails to depart within the time authorized, a deportation order automatically vests, and if he subsequently departs this executes the deportation order under Sect. 101 (g) of the Act, even though no separate formal order has been entered, 8 CFR 243.5.

Adjustment of Status

Historical Background. Before the enactment of the Act in 1952, the Service had coupled the statutory relief of voluntary departure with an administrative form of relief called pre-examination. This enabled an alien here illegally for whom an immigrant visa was immediately available to go to an American Consul in Canada, pick up the visa and return to the U.S. as an immigrant, all with the least possible disruption of his life here. Par. 245 of the INA now permits such an alien to adjust his immigration status to that of an alien lawfully admitted for permanent residence without having to leave the U.S. This new form of relief, designed as a substitute for pre-examination, was originally intended solely for those who entered lawfully as nonimmigrants and maintained that status. Subsequent amendments were designed to cope with flagrant abuses of the new law, and the following have been successively excluded from its benefits: 1) crewmen; 2) natives of the Western Hemisphere; 3) transits without visas (TRWOVs); 4) aliens who worked without INS permission.

Eligibility Requirements. Under the most recent amendments, effective January 1, 1977, the following requirements are laid down; 1) the alien must have been inspected and admitted or paroled into the U.S. Therefore, an alien who entered without inspection (as is the case with many who entered surreptitiously over the Mexican border) is not eligible; 2) the alien must apply for adjustment (The application is made on Form I-485. The fee is \$25.00); 3) the alien must be eligible for an immigrant visa and must be admissible to the U.S. for permanent residence. Therefore, he must have the labor certification required by Sect. 212 (a) (14) of the Act, unless he is within one of the classes exempted from this requirement. If inadmissible on certain grounds, a waiver of inadmissibility may be sought which, if granted, will eliminate this obstacle [Example: Permission to reapply after prior deportation, needed under Sect. 212 (a) (17) of the Act]; 4) An immigrant visa must be immediately available at the time the application is filed; 5) Good moral character is not a statutory eligibility requirement. However, it is a factor which is considered in exercising administrative discretion; and 6) Western Hemisphere natives are no longer ineligible.

Ineligible Classes. In addition to aliens who entered without inspection, Sect. 245 now precludes relief to 1) crewmen; 2) TRWOVs; 3) aliens who on or after January 1, 1977, worked without INS permission before filing a Sect. 245 adjustment application (except immediate relatives of U.S. citizens). The INS has authorized a *nunc pro tunc* grant of work permission in two types of cases; 1) where a Sect. 245 adjustment application was erroneously rejected by INS when sought to be filed with a visa petition, as authorized by 8 CFR 245.2 (a) (2);¹⁴ 2) pursuant to court order in *Silva v. Levi*, N.D. Ill. No. 76-C-4268, to certain Western Hemisphere natives improperly denied visa numbers because of erroneous assignment of Western Hemisphere numbers in Cuban refugee adjustment cases.¹⁵ It has also been suggested that work permission can be granted *nunc pro tunc* in individual cases to remove this ground of ineligibility under the Attorney General's broad grant of authority under 8 CFR 3.1 (d) (1) and 242.8 (a), on the rationale of *Matter of Vrettakos*, 14 I&N Dec. 593 (BIA 1973, 1974) and *Matter of Ducret*, Int. Dec. 2483 (BIA 1976).¹⁶ No such case has come to attention as yet.

Exercise of Discretion. Neither the statute nor the regulations lay down any standards for the exercise of discretion and this opens the door to arbitrary judgements based on the subjective attitudes of individual adjudicators.¹⁷ General standards have evolved through successive precedent

¹⁴ See, *Interpreter Releases Bulletin*, July 5, 1977, p. 223 b.

¹⁵ See, *Interpreter Releases*, 54: 132, 1977. ¹⁶ See, *Interpreter Releases*, 54: 347, 1977.

¹⁷ See, Roberts, "The Exercise of Administrative Discretion Under the Immigration Laws", *San Diego Law Review*, 13: 144, 1975, reprinted in *Interpreter Releases*, 53: 80-102, 1976.

decisions. It was formerly held that even where an alien establishes eligibility and there are no adverse factors, relief will be denied unless the case is "meritorious", i.e., where there are additional "equities" in an alien's favor [*Matter of Ortiz-Pietro*, 11 I&N Dec. 317 (BIA 1965)]. This standard has now been abandoned. The rule now applied is that generally discretion will be favorably exercised in behalf of an eligible alien, unless there are adverse factors present. Adverse factors will call for discretionary denial, unless counterbalanced by equities in favor of the alien [*Matter of Arai*, 13 I&N Dec. 494 (BIA 1970)];¹⁸ [*Matter of Blas*, Int. Dec. 2485 (AG 1976)];¹⁹ [See also *Elkins v. Moreno*, — U.S. —, 46 LW 4337, 4342 (No. 77-154, April 19, 1978)].

Adverse Factors. Among the factors considered are: 1) moral character. Poor moral character is ground for discretionary denial [*Matter of Francois*, 10 I&N Dec. 168 (BIA 1963)]. 2) Preconceived intent. A preconceived intent on the part of the alien to enter the U.S. in the guise of a nonimmigrant visitor and after entry to stay and seek permanent residence is an adverse factor. Taking up employment soon after entry and bringing along documents needed for immigration are frequently accepted as evidence of such preconceived intent. 3) Abandonment of family abroad. Abandonment of a family abroad and failure to support children are evidence of poor moral character. However, where an alien divorces his wife abroad and furnishes support pursuant to a court order, this in itself does not warrant discretionary denial, especially where he has in good faith remarried to a U.S. citizen and his deportation, while breaking up his American family, would not restore the foreign family unit (*Matter of Blas*, *supra*). 4) Unauthorized employment. The INS has held that where a labor certification or exemption therefrom has been based on the alien's experience gained through unauthorized employment, adjustment will be denied as a matter of discretion. [*Matter of Yarden*, Int. Dec. 2513 (R.C. 1976)];²⁰ *Matter of Leung*, Int. 2530 (D.D. 1976). The Board has recently disapproved those decisions, holding that where a labor certification has been granted this indicates the employment has benefited the U.S. [*Matter of Lam*, Int. Dec. 2628 (BIA 1978)].²¹ It should be noted that the statute now precludes eligibility for those who worked without authorization on or after January 1, 1977, before filing an adjustment application, unless the alien is an immediate relative of a U.S. citizen.

Equities. Among the equities usually considered as making a case "meri-

¹⁸ Digested in *Interpreter Releases*, 47 120, 1970.

¹⁹ Digested in *Interpreter Releases*, 53: 127, 1976.

²⁰ Digested in *Interpreter Releases*, 53: 313, 1976.

²¹ Digested in *Interpreter Releases*, 55: 13, 1978.

torious" and as worthy of consideration as countervailing, is usually where there are adverse factors such as close family ties in the U.S., long residence here and similar factors which would establish hardship if the alien were required to depart. Although close family ties will ordinarily result in the favorable exercise of discretion, there is an exception where the alien has engaged in a course of deception designed to produce those very ties. [*Matter of Blas*, Int. Dec. 2485 (A.G. 1976)].

Procedure. If deportation proceedings have not been started, a Sect. 245 application on Form I-485 is filed with the District Director with the \$25.00 fee. If he denies it, the decision is not appealable, but the alien can renew his application in the deportation proceedings which follow [8 CFR Sect. 245.2 (a) (4)]. Once deportation proceedings have been started, the application is made in those proceedings. [8 CFR Sect. 245.2 (a) (1) and 241.17 (a)]. If a visa number was available when the application was filed with the District Director, this satisfies the visa availability requirement when the application is renewed in deportation proceedings, [*Matter of Hueng*, Int. Dec. ____ (BIA April 10, 1978)].²² If inadmissible to the U.S. on a ground that can be waived, a waiver can be applied for during the course of the proceedings. [8 CFR Sect. 245.1 (f)].

Suspension of Deportation

Sect. 244 (a) of the INA authorizes the suspension of deportation and creation of a record of admission for permanent residence in the cases of deportable aliens with long residence here who may perhaps not be eligible for an immigrant visa but who can establish the requisite hardship. The statute sets up two classes of eligibility requirements, depending on the nature of the ground for deportation.

Seven-Year Cases. Under Sect. 244 (a) (1), to establish eligibility an alien must show 1) that he is deportable under the less serious grounds (i.e., not under Sect. 241 (a) (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18)); 2) that he has been physically present in the U.S. for a continuous period of at least seven years preceding his application; 3) that he has been a person of good moral character during that period; and 4) that his deportation would result in extreme hardship to himself or to his U.S. citizen or lawfully permanent resident spouse, parent or child.

Ten-Year Cases. Under Sect. 244 (a) (2), an alien deportable on any of the more serious grounds stated above must show 1) continuous physical presence for at least 10 years since becoming deportable; 2) good moral character

²² Digested in *Interpreter Releases*, 55: 156-157, 1978.

during that period; and 3) that deportation would result in exceptional and extremely unusual hardship to himself or to his U.S. citizen or lawfully permanent resident spouse, parent or child.

Ineligible Classes. Sect. 244 (f) precludes relief to 1) an alien who entered as a crewman after June 30, 1964; 2) an alien who is an exchange visitor; and 3) a native of a contiguous territory or an adjacent Island, unless he is ineligible for a visa as a special immigrant. Since recent legislation eliminated Western Hemisphere natives from the "special immigrant" category, they are no longer eligible for such visas and are therefore, no longer ineligible for suspension on this account [*Matter of Finlayson*, Int. Dec. 2569 (BIA 1977)].²³

Continuous Physical Presence. The continuity of the required physical presence is not broken by a brief, casual departure to Mexico [*Wadman v. INS*, 329 F.2d 812 (9th Cir. 1964)]. Although an unlawful original entry does not bar suspension, where aliens used fraud to reenter the U.S. after 6 weeks absence in order to resume their illegal residence here, this was held to break the continuity of their physical presence for suspension purposes [*Heitland v. INS*, 551 F.2d 495 (2nd Cir. 1977)]. Under Sect. 244 (b), the continuous physical presence requirement is waived for an alien who served honorably in an active-duty status in the U.S. Armed Forces and was in the U.S. at the time of induction.

Extreme Hardship. This is both an eligibility requirement and a factor which is considered in exercising discretion. In early decisions, the BIA indicated that the following are among the relevant factors: 1) length of residence in the U.S.; 2) family ties here; 3) possibility of obtaining a visa abroad; 4) financial burden on the alien of having to go abroad to obtain a visa; and 5) health and age of the alien [*Matter of S—*, 5 I&N Dec. 409 (BIA 1953)]; [*Matter of U—*, 5 I&N Dec. 413 (BIA 1953)]; [*Matter of H—*, 5 I&N Dec. 416 (BIA 1953)]. In recent years, there has been considerable tightening up.

Economic Disparities. It has generally been held that disparities in the economic situations and employment opportunities here and in the country of deportation do not constitute the extreme hardship contemplated by the statute. *Matter of Liao*, 11 I&N Dec. 113 (BIA 1965); *Matter of Uy*, 11 I&N Dec. 159 (BIA 1965); *Matter of Sangster*, 11 I&N Dec. 309 (BIA 1965); *Matter of Kojoory*, 12 I&N Dec. 215 (BIA 1967); *Matter of Lam*, 14 I&N Dec. 98 (BIA 1972); *Matter of Gibson*, Int. Dec. 2541 (BIA 1976). This has been true even where the alien has close family ties here, such as U.S. citizen children of tender years [*Matter of Kim*, Int. Dec. 2318 (BIA 1974)].

²³ Digested in *Interpreter Releases*, 54: 236, 1977.

A recent congressional committee report indicates that economic and political conditions in the country of deportation should be given consideration, H. Rept. No. 94-506, 94th Cong., 1st Session, p. 17.²⁴

Exercise of Discretion. Even where eligibility is established, relief can still be denied in the exercise of administrative discretion [*Hintopoulos v. Shaughnessy*, 353 U.S. 72 (1957)]. While discretionary relief may not be denied merely because an alien refused to answer questions on Fifth Amendment grounds, his failure thereby to supply needed evidence as to eligibility may result in denial for lack of eligibility [*Kimm v. Rosenberg*, 363 U.S. 405 (1960)]. Discretionary denial merely because a congressional committee has frowned on the grant of suspension to aliens who had achieved the statutory residence period while here in a "protected status" has been disavowed. [*Asimakopoulos v. INS*, 455 F.2d 1362 (9th Cir. 1971)]; [*Matter of Riccio*, Int. Dec. 2463 (BIA 1976)]. Discretionary denial has been justified, however, where the alien eked out the required residence by continuous resort to dilatory litigation [*Schieber v. INS*, 520 F.2d 44 (D.C. Cir. 1975)].

Procedure. Suspension of deportation can be applied for only during the course of deportation proceedings, 8 CFR Sect. 242.17 (a). The application is made on Form I-256A and the fee is \$65.00. If granted by the Immigration Judge (or by the BIA on appeal), the facts are referred to Congress, which has reserved a veto power. In seven-year cases, Congressional inaction results in suspension of deportation and creation of a record of lawful admission for permanent residence. In ten-year cases, affirmative congressional action is required. The validity of this congressional reservation of veto power has been challenged, and in a recent case the Government has filed a brief in court agreeing with the position of the alien's attorney that the reserved veto power is unconstitutional (*Chadha v. INS*, 9th Cir. No. 77-1702).²⁵

Diminishing Importance of Suspension. The long residential requirements and tight extreme hardship factor limit the applicability of this remedy. If the Administration's proposed amnesty provisions (H.R. 9531 and S. 2252) become law, and the registry cut-off date is moved up to January 1, 1970, this should largely replace suspension as a remedy. At the same time, suspension is still useful in some situations, since there is not labor certification requirement, and inadmissibility or deportability is not a bar.

Registry

Background. Registry, now governed by Sect. 249 of the Immigration and

²⁴ See *Interpreter Releases*, 55: 15, 1978.

²⁵ See *Interpreter Releases*, 54: 390, 1977.

Nationality Act, is a remedy whereby a record of lawful admission for permanent residence can be created for an alien in the U.S. in whose case such a record is not available. Originally intended as an aid to naturalization, to supply a record on which a declaration of intention and naturalization petition could be based, the remedy is now an important method of adjusting immigration status as well. The basic feature is in the creation of a record for an alien who can prove that he was in the U.S. before a certain cut-off date and has remained here since. The original cut-off date was May 19, 1921. This date has been advanced by successive legislation to July 1, 1924, June 28, 1940, and finally (in 1965) to June 30, 1948. It is interesting to note that the Administration's pending bills on undocumented aliens (H.R. 9531 and S. 2252) would provide amnesty by moving up the cut-off date to January 1, 1970.

Eligibility Requirements. The statute lays down the following eligibility requirements: 1) No record of the alien's lawful admission for permanent residence is available. There may be a record available which does not meet the standard, e.g., the alien may have been erroneously admitted as a U.S. citizen, or he may have been admitted as a temporary visitor, or his recorded admission as an alien for permanent residence may have been unlawful, or he may have been enlarged on parole; or there may be no record at all; 2) the alien must not be inadmissible on the more serious grounds, such as those relating to criminals, prostitutes and procurers, subversives, narcotics law violators, or alien smugglers; 3) he must have entered the U.S. prior to June 30, 1948; 4) he must have resided here continuously since then; 5) he must show that he is a person of good moral character (No specific period of good moral character is required.); 6) he must not be ineligible for citizenship. (Since racial disqualifications to citizenship have now been removed, this is of minor importance and applies only to a limited number who took advantage of the opportunity to decline military service.)

Procedure. The application is made on Form I-485, accompanied by executed Form G-325A and the fee of \$25.00. If the alien is inadmissible to the U.S. on any ground which bars eligibility and he is eligible for a waiver of that ground, he can apply for a waiver in conjunction with the Sect. 249 application, 8 CFR 249.1. If the District Director denies the Sect. 249 application, there is no appeal, but it can be renewed in the deportation proceedings which follow, 8 CFR 249.2. If deportation proceedings have already been started, the application is submitted in those proceedings, 8 CFR 242.17 (a). The record of lawful admission for permanent residence is created as of the date the application is approved. However, if the proved entry occurred prior to July 1, 1924, the record is created as of the date of entry. This backdating, although obviously available only in a limited number of cases, can be

important. If the applicant is one who would have derived U.S. citizenship but for the absence of a record of lawful admission for permanent residence, the *nunc pro tunc* creation of such a record may endow him with citizenship. In any event, it immediately vests him with the five years' permanent residence prerequisite to naturalization.

Discretion. While the grant is discretionary, relief is seldom denied to eligibles in the exercise of discretion. Since under the present statute the alien must show continuous residence in the U.S. for almost 30 years, the hardship entailed in denial after such long residence here should be a compelling equity. Practically all the cases which have been reported in recent years have involved questions of statutory eligibility rather than the exercise of discretion. However, if the Administration's proposals should become law and the cut-off date should advance to January 1, 1970, it can be anticipated that some hard-nosed adjudicators would deny applications more frequently as a matter of discretion.

Waiver Under Sect. 212 (e)

Nature of Remedy. Sect. 212 (e) of the INA provides for a discretionary waiver of inadmissibility in the case of an alien 1) who was lawfully admitted for permanent residence; 2) who temporarily proceeded abroad voluntarily and not under an order of deportation; 3) who is returning to a lawful unrelinquished domicile of seven consecutive years; and 4) who is inadmissible under Sect. 212 (a) (1) through (25), (30) and (31). Until recently, this was remedy only from exclusion, and could be invoked by an alien convicted on a narcotics violation which rendered him inadmissible under Sect. 212 (a) (23). An alien similarly circumstanced whose narcotics conviction rendered him deportable under Sect. 241 (a) (11) and who had not left the U.S. did not benefit from this provision, unless he could use the waiver as an adjunct to a Sect. 245 adjustment application. However, a recent court decision held that such a distinction violates the Equal Protection Clause and construed Sect. 212 (c) as providing direct relief for an alien in deportation proceedings as well [*Francis v. INS*, 532 F.2d 268 (2d Cir. 1976)]²⁶ The BIA has accepted that holding as a rule of general applicability [*Matter of Silva*, Int. Dec. 2532 (BIA 1976)].²⁷ A later court decision liberally construed the "lawful unrelinquished domicile" provision of Sect. 212 (c) as possibly including an overstayed crewman's domicile here immediately preceding his lawful admission for permanent residence [*Tim Lok v. INS*, 548 F.2d 37 (2d Cir. 1977)].²⁸ The BIA, however, refuses to apply that holding in cases outside the Second Circuit [*Matter of Anwo*, Int. Dec. 2604 (BIA 1977)].²⁹

²⁶ Digested in *Interpreter Releases*, 53: 118, 1976.

²⁷ Digested in *Interpreter Releases*, 54: 148, 1977.

²⁸ Digested in *Interpreter Releases*, 54: 124, 1977.

²⁹ Digested in *Interpreter Releases*, 54: 343, 1977.

Special Consideration in Defending the Alien

JACK WASSERMAN*

THE United States Deportation Statute is long, arbitrary and confusing, and contains approximately seven hundred grounds for deportation. In addition to this, there is no statute of limitations against deportability which may be applied retroactively.

When confronted with a client who has been charged with deportable status, it is first necessary to study the grounds for deportation involved. Naturally, if a foreign statute is involved, it is imperative to obtain the foreign statute; if a conviction is involved, then the conviction too must be acquired.

An illegal alien may come to you in one of two ways. He may walk into your office and you will subsequently learn that the client is an illegal alien. Then, it will be necessary to determine whether it would be appropriate to surrender the client to the authorities. The advantages to surrendering the alien at this point would be first that the bond will be lower, also, the alien usually will not be detained and you will be able to process his case with much less difficulty. The other way in which an illegal alien may contact you is by calling you after he has been placed in detention. In this case, it will first be necessary for you to determine what the bond will be. Once bond is set, you will want to post the bond. The best way to post the bond is by posting full collateral. You would not want a bonding company because the bonding company in turn will require you to post full collateral. If the bond is set too high by the District Director, you have the right to appeal to an Immigration Judge, this can be done by telephone. You can reach the Immigration Judge available in your area, in the neighboring district or anywhere in the United States. I have found setting a bond by telephone is unsatisfactory. It is much better to do it in person. The procedure

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is to go to the nearest Immigration Office and actually plead before the Immigration Judge to set bond lower. Since the alien will have to be present, you may have a problem in your district if there is no Immigration Judge available. If the Immigration Judge turns you down or the bond that is set by the Immigration Judge is unsatisfactory, you will have an opportunity to appeal to the Board of Immigration Appeals. Naturally, all these appeals are expedited.

The Order to Show Cause is the document which initiates the deportation proceedings. The place of hearing, I feel, should normally be in the place of the alien's residence. I had a case just this morning. I was on the telephone before I came here discussing the case of an alien who was apprehended in Maryland but he resides in the District of Columbia. The case was transferred to the District of Columbia which is, as it happens, also more convenient for me.

As far as the lawyers are concerned, one of the first things you will want to do is set your fee and then file your Notice of Appearance. Rule One is setting your fee — and I prefer to do it in writing with a distinct agreement setting forth all terms of my retainer with the alien so that there will be no dispute later. Another point I should like to emphasize is the importance of keeping a neat, orderly and chronological file. In *Matter of Solomon*, a recent interim decision, a lawyer was suspended from practice for, I believe, six months by the Board of Immigration Appeals on complaints filed by aliens. Esther Kaufman defended him after he had first come to me and I saw the condition of the files he had with respect to these aliens. You could not make heads or tails of the papers. I pride myself on the fact that anyone can take over a file of an alien that I have had and know what has gone on in that case. In advising an alien, do your homework and prepare the case in advance. Know what the charge is, whether it is sustainable, whether you will ask for voluntary departure or, whether you are going to ask for any other form of relief.

I have found pre-hearing conferences extremely valuable. I get down to the Immigration Office at 7:30 in the morning so that I can see the trial attorney. Frequently he has not yet looked at the file nor analyzed it until the morning, or day before the hearing, so it would not be possible to see him well in advance to discuss the case, although you can see him on the morning of the hearing.

Regarding continuances, there should be no difficulty in securing an initial continuance of the deportation hearing in any district. The only difficulty you would encounter here is determining whom you should approach about a continuance. Sometimes the trial attorney handles it, sometimes the clerk handles it and sometimes an assistant handles it. In Atlanta, at one time, you had to speak to the district director and he was

the only one who could give you a continuance. The second continuance is always more difficult to obtain. There you will have to show cause, and you may even have to approach the Immigration Judge at the hearing. At a deportation hearing you can make as many motions as your imagination will allow. In some criminal cases, I have prepared a set of as many as twenty-two motions and I see how many can be fit into the deportation case.

A move for dismissal, can be done orally, or in writing. I think it is much more impressive to do it in writing. You can also move to disqualify the Immigration Judge for cause. I have had occasion to desire to disqualify someone as judge with whom I had worked in the Immigration Service. I felt he would be prejudiced to my type of case because of some prior connection he might have had with the prosecution of that particular case. In one case I moved to disqualify a judge in a Federal Court, and I am sure that if I had not done it, I would have lost the case. He disqualified himself. I was assigned another judge, and I was able to establish that this person whom the government claimed was an alien, born in Greece, was a citizen of the United States.

You can also move to exclude the general public from a deportation proceeding. I had a case in New Orleans where they were questioning my client about his income taxes for the past ten years. I did not want this in the newspapers the next day, so I moved to exclude the general public for the sole purpose of excluding the press.

Motions may also be made to take dispositions of witnesses who are not available at the place of hearing and to issue subpoenas. Both of these motions, however, unless you have the consent of the trial attorney, will require the support of materiality and the demonstration for the necessity of the testimony of these witnesses. Although it is difficult, you can also move to have the state produce favorable testimony.¹ I have, on occasion, made a general motion saying, "The government has favorable evidence. Please produce it". If you know the specific evidence, however, you are in a much better position. Do not overlook the Freedom of Information Act.² It is a valuable tool. Wherever the government indicates they have adverse information I ask for the material under the Freedom of Information Act. In a case on which I am currently working, my client is charged with possession of narcotics. I do not have enough time to obtain the Hong Kong conviction which I know the Service has. I called the office in charge in Cincinnati and he suggested I give him a written request for the conviction under the Freedom of Information Act. I recently received the material.

You can also move to suppress evidence secured by unlawful electronic surveillance,³ and you can demand that the government deny or affirm

¹ *Brady v. Maryland*, 373 U.S. 83 (1963). ² U.S.C. Par. 532 (1970). ³ 18 U.S.C. Par. 3504.

whether it has evidence in its possession secured by unlawful electronic surveillance.

One of the big problems in an immigration case is proving that your client is testifying truthfully. Basically, the Immigration Service tends to say that what the alien says is self-serving, although I have never heard the courts say that. There, either you believe an alien or you do not believe an alien. Just as you would choose either to believe the witness or not. There are, however, ways to convince the Immigration Service that your client is telling the truth. One way, of course, is to bring character witnesses who could testify that he has a reputation for truth. Another way, is to bring witnesses, such as his employer, to show what a truthful and hardworking person he is. There are other ways, I have seen criminal cases where they inject sodium pentathol into the person and they video-tape his answers. There are lie-detector tests and I guess you can even bring in psychiatric experts. You can also bring in other types of character witnesses. I once represented a man whom the government said was a trigger man for Murder Inc. I finally got him suspension from deportation, and then I applied for his naturalization. The government was fighting me tooth and nail on the naturalization and I had to prove that he had been of good moral character in the naturalization case. Well, we just combed the community. We brought in his priest to testify favorably. We brought in his friends. We brought in every type of representative of various community organizations. The Kiwanis, The Rotary Club, the Unions, you name it and we brought him in. The man was finally naturalized and the court was convinced that he was of good moral character. So, there are ways of supporting the veracity of the testimony of your client.

In the deportation hearing, the alien does have the right to remain silent. I have had occasions where, if I think I am right, I will advise my client not to testify until I tell him to testify. The issue of interpreters is also very important. Whenever I see an immigration interpreter, I think of Steven Seymour. Remember him? He was the interpreter for the President in Poland who had him lusting for the Polish people. You have to be careful about interpreters. I went to Hawaii several years ago and we brought in a Japanese lawyer to testify. We also had three of our own interpreters present at the hearing to check on the official interpreter who my client claimed was not competent. My question to the Japanese lawyer at the hearing was "Did you go down to the jail"? Meaning 'did you visit the jail'. And when I asked the question, the first answer was "No". And I realized that something must be wrong. Then I rephrased the question, "Did you visit the jail"? and he said, "Yes". The first time it was translated "Did you go to jail". Of course, he said no, this also shows how dropping one little word can throw off the context of the question.

When you walk into a hearing room, the Immigration Judge is seated on

an elevated platform. You sit around the table. Your client will be next to you with the interpreter next to him. On the other side of the table will be the trial attorney. The testimony will be recorded. The very first thing that the alien is required to do, after he is asked to identify himself, and the counsel identifies himself, will be to plead to the Order to Show Cause. I never let my client plead. I plead. The Trial Attorney and the Immigration Judge, will let you do that. I also always invoke my right to cross-examine. If an adverse witness appears, you have the right to invoke the Jencks Act.⁴ You will also want to know what prior statements were made so that you can examine them and see whether or not they are consistent with his testimony. You have the right to ask for that immediately before you even begin your cross-examination.

Hearsay can be utilized, I think you should want to know the Federal Rules of Evidence particularly with regard to hearsay. There was a recent Board decision⁵ where a statement given by a wife was utilized against her husband in a rescission case. This turned out to be the controlling evidence and was considered admissible on the ground that the wife had made the statement against penal interests. I am not at all sure that the Board applied the Federal rules properly. On the contrary, I think the decision was incorrect. I do not think the wife was aware that her testimony was incriminating in a conspiracy to defraud the Immigration Service. I think that even if she did incriminate herself, her testimony was not the type of substantial testimony, clear and convincing testimony, that should be utilized to deprive a person of his permanent residence.

If the Immigration Service finds out that they have not set forth the proper charges in the Order to Show Cause, it has the right in a deportation proceeding to lodge an additional charge. In such a case, the Immigration Service must lodge the charge in writing and you are entitled to an adjournment. Very often I will waive this requirement. At least know, however, that you have the right to waive it. You are permitted to raise constitutional issues during the deportation hearing but the administrative judge will not pass on constitutional issues.

Finally, carefully consider charges of fraud which are levelled against your client. I find that our administrators are very free in concluding that mere misstatements by an alien constitute fraud. They do not. Review the general rules of fraud which require clear and convincing evidence and place the burden of proof upon those who charge fraud. First of all, if you have such a case (stay of deportation on grounds of persecution) you have the right to ask for an adjournment. You can obtain ten days to file such a claim because it has to be filed in writing in affidavit. Second, you will

⁴ *Jencks v. the United States*, 353 U.S. 657 (1957).

⁵ *Matter of De Vera*, Interim Decision 2597 (BIA 1977).

want to be concerned with two elements. First, you must consider the conditions in the foreign country. There is a wealth of material on that, i.e. there are newspaper clippings that you can get and magazine articles. There is material from Amnesty International. Just last month, at the end of January, the State Department, pursuant to the Foreign Assistance Act, sent a report on conditions in 119 foreign countries which are the recipients of financial assistance or security assistance. The report analyzes thoroughly, conditions in foreign countries. It talks about torture, about political rights, and about whether or not a particular country allows an investigation of human rights. There are other materials that you can gather from the particular national groups that may be in the United States which have studied conditions in a particular country. Therefore, you should not be at a loss to get material on what is happening in a particular country. Where you will get into much more difficulty is proving that your particular alien will be the subject of persecution in that particular country. Here you might want to get witnesses from the country. You might want to get prominent defectors from the country. This only applies in totalitarian countries because you do not have quite that difficulty when dealing with Communist countries. Frankly, the two sets of countries really should be treated alike but they are not. In a deportation proceeding you can also seek any necessary waivers which are necessary to complete the type of relief you are seeking. On the question of prosecution, there are some recent cases both in the Fifth Circuit and the First Circuit which seem to indicate a relaxation by the courts on the strict interpretation of the Immigration Service.⁶

With regard to voluntary departure, I prepare the alien so that he will come out with the right answers. As a matter of fact, confirming the deportation date, I advise the alien that he will be asked whether he has a criminal record, whether he is opposed to Communism and whether he is willing to depart voluntarily rather than to be deported. If you utilize the phrase, "rather than to be deported" generally the alien comes out with the right answer and then I ask him whether he has the funds with which to depart. One way of proving that he has the funds in a situation that might be contested, is to come to the deportation hearing with an airline ticket. The Immigration Judge will then give you thirty or sixty days or a longer period in appropriate cases.

In the deportation hearing, the alien has the right to designate a single place of deportation. He cannot designate a contiguous territory unless he is from that territory either as a citizen or a resident. What is very important, is to find out whether or not there is a receiving country for the alien.

⁶ *Martinez de Mendoza v. INS*, (3rd Cir. 1977); *Coriolan v. INS*, 557 F.2d 993 (5th Cir. 1977).

Everything you do may be unnecessary if there is no receiving country for the alien. Sometimes it is beneficial to try to demonstrate that there is no receiving country for the alien. I have a case which I am litigating in Italy to establish by lawsuit there that my client is not an Italian citizen. Our information is that it takes ten or twenty years to complete that type of litigation.

In deportation practice, where the case warrants it, I strongly recommend preparing thorough trial memorandum for the Immigration Judge. For the convenience of the Judge, if I have one or two court cases that I am relying on I attach copies, since he does not always have a law library in his office, or even in the same building. If you want a speedier determination, that is a good way to expedite your case. I used to appear before a Judge in the District Court here in Washington, Judge Holtzoff, who taught lawyers how to be brief and to the point. He always said: "Tell me in one sentence what your case is about". By the same token, if I appeared before him and I had one case that I relied on heavily, which was in my favor, I would have a marshal bring the full text and place it on his desk. And, by God, he would read it and dictate an opinion from the bench, generally favorable to me. So, these are the things you will want to be careful about.

Being counsel for the alien is a most facinating role. There is not a phase of the law that you do not touch. In the end, even though one important factor is the remuneration which is very satisfactory. I find that in a deportation hearing by saving a life or keeping a marriage together a great feeling of satisfaction is given.

Legal Problems and American Consulates Abroad

CORNELIUS D. SCULLY*

GENERALLY legal problems involve rights — constitutional rights, civil rights, contract rights, creditors' rights — all legally enforceable rights. Where a legally enforceable right is recognized to exist, claims that such a right has been infringed upon are cognizable and courts will undertake to adjudicate the claims and to provide some form of remedy for the party claiming to be aggrieved if he can establish the validity of his claim.

Given this situation, it would appear impossible for legal problems to arise out of visa operations at consular offices abroad since it is clear that an alien does not have a legally enforceable right of entry into the United States. The right of a sovereign state to prohibit entirely, or to regulate as it sees fit, the entry of non-citizens into its territory is universally accepted as an attribute of sovereignty and this principle appears to be as old as the concept of citizenship or of the state itself. Under the system in the U.S. the courts have repeatedly reaffirmed this principle and have just as often affirmed that it is to the Congress that our Constitution assigns the authority to determine who shall enter, in what numbers, for what purposes and under what conditions.

The Congress, in enacting and periodically amending our immigration laws, exercises this Constitutional power. Among other things the Congress has established certain requirements for entry and certain procedures to be followed in the processing of applications. Congress has also entrusted to the consular officer the authority and responsibility for the application of these requirements and procedures in individual cases. It has conferred upon the Secretary of State the authority to establish in detail the requirements and procedures, forms etc., to be used by consular officers in the process. Clearly, the Congress intended and contemplated that certain classes of aliens would be denied entry and other classes of aliens would be granted entry. It is for this reason that the superficial negative answer to the question whether an alien has a right of entry into the United States

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ceases to be sufficient. If the Congress intends and contemplates that an alien who meets the requirements it has established for entry should be granted entry and has designated the consular officer as its agent to determine which aliens are admissible and which not, can it not properly be said that the Congress has conferred upon the admissible alien a form of right, at least to the extent that a consular officer is without authority to refuse to issue a visa to an alien who has met the requirements therefor? It seems to me that this is the case. In any event, this is unquestionably the opinion of the Department of State.

Of course, this right is not of the same character as other rights since it is not legally enforceable. The Congress in 1952, considered the question whether there should be judicial review of consular decisions in visa cases and, having concluded that there should not be, drafted the Act in such a way as to prevent it. Since that time, courts have refrained from undertaking such judicial review. Moreover, under the Act, the decision of the consular officer is not reviewable by the Department of State itself. Given these facts, it is quite legitimate to ask whether the concept that an admissible alien has had some form of right conferred upon him by the Congress can have any real meaning. I believe that it does have meaning.

The very existence of the Immigration and Nationality Act with its substantive and procedural rules and requirements, its terms of art and its technical definitions imposes upon us who administer its provisions an affirmative duty to conduct ourselves in accordance with accepted rules of law and statutory construction. Marjorie Whiteman, a former State Department lawyer who edited the *Digest of International Law*, quotes at one point a State Department opinion concerning the diplomatic immunity of foreign government officials in the United States and its effect on their obligation to conform to United States law while in the United States. The essence of the opinion was that diplomatic immunity shielded the individual who possessed it from legal process which might otherwise result from his failure to obey the law, but it did not relieve the individual from the obligation to obey. Similarly, the immunity from judicial review or from review by the Department of State which the consular officer currently possesses in respect to his decisions in visa cases does not relieve him of the obligation to act in conformity with law in making those decisions.

Having said all the foregoing, what are, as a practical matter, an alien's rights in the visa process? The alien is first entitled to have his case considered on its merits, expeditiously and without partiality in accordance with standardized, substantive and procedural rules and requirements which are made known to him and which fairly reflect and carry out the intent of the law. In processing his application, he may receive assistance from and/or be represented by any person he may choose for this purpose. If he is found to be ineligible to receive a visa, he is entitled to a detailed

explanation of the facts which render him ineligible, provided, of course, that the information is not classified.

How does the visa office accomplish — or attempt to accomplish — the task of supervising and controlling the visa process of some two hundred posts abroad, to ensure that every case is treated in this manner? We cannot order a consular officer to issue or to refuse a visa in an individual case. We can, however, do two things which have a significant bearing on the outcome of most cases. First, we provide to consular officers, general guidance as to the proper interpretation of various provisions of the law for their use in adjudicating individual cases. These interpretations are binding upon the consular officer. Thus, we are in a position to inform the consular officer that, as a matter of law, a given set of facts will not render an alien ineligible to receive a visa. Unless the consular officer develops new facts not previously known, the ruling we have made is binding upon him. In effect then, the consular officer's authority, purportedly unreviewable is subjected to this constraint.

Secondly, we establish the procedures to be followed in processing individual cases and the form to be used in the process, I will not go into great detail on this matter, but obviously the procedural mechanics have a substantial impact on the outcome of cases, often a much greater impact than is realized.

Consular officers are governed in their visa work by visa regulations which are published in parts 41 and 42 of Title 22 of the Code of Federal Regulations. These regulations provide that "a visa shall be refused only upon a ground specifically set out in the law or regulations issued thereunder". Since the law requires the consular officer to refuse a visa if the alien is ineligible to receive it, the regulations require that the consular officer's determination of the refusal to issue the visa must be based upon facts or circumstances which would lead a reasonable person to conclude that the applicant is ineligible to receive a visa as provided in the law and regulations. The regulations also set forth the procedure to be followed by consular officer at the post and a designated senior officer reviews each visa refusal. If the reviewing officer does not concur in the refusal he can take one of two courses of action. He may either assume responsibility for the case himself or he may refer the case to the department for an advisory opinion. From these procedures you will see that we have made every effort to ensure the maximum possible consistency in what must, in the final analysis, be human judgment. Of course, any law or any regulations, however precisely worded, must necessarily leave an area of interpretation when these laws and regulations are applied to individual cases, each of which is somewhat different from the next one. It is the Department's intention that every decision be based as solidly as possible upon a full exploration of the facts and upon the best experience and wisdom and

judgment available.

Of course, there will always be cases in which novel questions of law arise which cannot be readily resolved in the field. To meet this situation the department for years has offered advisory opinions to consular officers at their request or if a case comes to the department's attention as a result of an inquiry from congressional sources, attorneys, relatives, or other interested parties. Requests for advisory opinions are usually handled in the visa office by experienced senior officers under the direct supervision of the director of the visa office.

Occasionally, questions of law are submitted to the Attorney General for ruling. Visa cases of far-reaching legal or political significance are brought to the attention of the Assistant Secretary for Consular Affairs who decides whether they should be taken to a higher level of the department.

I should like to conclude my remarks by reassuring you of the Department's continuing efforts to perfect its visa procedures and I solicit any comments or suggestions you may have about the work done by consular officers or by the Department in carrying out the mandate of the law.

How to Represent the Alien Criminal Defendant

PETER SCHEY*

PRIOR to reaching disposition of any criminal case in which the defendant is an alien, defense counsel, the prosecutor and the Court should be thoroughly familiar with the consequences of such disposition on the defendant's immigration status. For most alien defendants, the consequences of a criminal conviction are felt not in the criminal proceedings, but rather in the setting of a later deportation or exclusionary hearing. Cases in which defense counsel inadvertently advises the alien client to pursue a particular strategy in the criminal proceedings which later has led to deportation or exclusion from the United States, are both tragic and legion.

Immigration attorneys must also familiarize themselves with post-conviction remedies that may be pursued to avert deportation or exclusion based on a criminal conviction. Such remedies are frequently available long after an actual imposition of a sentence.

To avoid having an otherwise satisfactory resolution of a charge turn into a serious miscarriage of justice, counsel must keep the alien's status and the Federal immigration laws in mind at each step of the proceedings — pleading, sentencing and post-conviction representation. The preservation of a person's right to continue residing in the United States may frequently depend on such awareness.

Identifying an Alien

While in some cases it may be extremely difficult to determine whether a person is an alien or a United States citizen, the following basic rules should resolve the question in most cases:

- 1) All persons born in the United States are deemed to be United States citizens [8 U.S.C. 1401 (a) (1)]. Whether the person left the United States at a young age is irrelevant.

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- 2) A person born outside the United States to parents, both of whom are United States citizens, and at least one of whom had a residence in the United States prior to the birth of such person, is a United States citizen [8 U.S.C. 1401 (a) (3)].
- 3) A person born outside the United States to parents, one of whom is a United States citizen who has been physically present in the United States for a continuous period of at least one year prior to the birth of such person, and the other of whom is a national (not a citizen) of the United States, is a United States citizen.
- 4) A person born outside of the United States, to parents one of whom is an alien, and the other a citizen of the United States, who, prior to the birth of such person, was physically present in the United States for a total period or periods of not less than ten years, at least five of which were after the age of fourteen, is a United States citizen [8 U.S.C. 1401 (a) (7)]. However, a person who thus qualifies for citizenship shall lose such citizenship unless, he is physically present in the United States for at least two years between the ages of fourteen and twenty-eight, or the alien parent is naturalized while the child begins to reside in the United States while under the age of eighteen years (8 U.S.C. 1401 (b)).
- 5) Certain aliens are statutorily eligible for naturalization (8 U.S.C. 1421, *et seq.*). A naturalized alien gains United States citizenship; such status should be evidenced by possession of a Certificate of Naturalization.

Other than those classes, the following statutory rights and changes should be noted:

1. Prior to 1934 the applicable law was Sect. 1993 of the Revised Statutes. (Sect. 1, Act of February 10 1855, 10 Stat. 604). This law provided United States citizenship at birth to children born abroad "whose fathers" were United States citizens. In *Weedin v. Chin Bow*, 274 U.S. 657, 47 S.Ct. 772, 71 L.Ed. 1284 (1927), the Supreme Court ruled that to acquire citizenship under Sect. 1993, the child's father must have resided in the United States for any length of time prior to the birth of the child.
2. Sect. 1993 was amended by the Act of May 24, 1934, which remained effective through January 12, 1941 (Sect. 1, Act of May 24, 1934, 48 Stat. 797). The Act of May 24, 1934, granted to United States women citizens the same rights previously extended to American citizen fathers under Sect. 1993 of the Revised Statutes.
3. The Nationality Act of 1940, effective on January 12, 1941, controlled citizenship rights from January 12, 1941, through December 24, 1952.

Sect. 504 of the Nationality Act specifically provided that the new act "shall not terminate nationality heretofore lawfully acquired" Nationality Act of 1940, 54 Stat. 1172. The Act of 1940 provided citizenship to 1) any person born outside the United States of parents both of whom had resided in the United States prior to the birth of the child; and, 2) any person born outside the United States to parents, one of whom was an alien and the other a citizen of the United States who had resided in the United States for a total of 10 years, at least 5 of which were after attaining the age of 16 years. Section 301 (c) and 201 (g), Nationality Act of 1940, 54 Stat. 1140 and 1139.

The Nationality Act of 1940 was repealed by the Act of 1952, 66 Stat. 279. However, Sect. 405 (c) of that Act, 8 U.S.C. 1101, note, specifies that the repeal of any statute "shall not terminate nationality heretofore lawfully acquired".¹

CRIMES INVOLVING MORAL TURPITUDE

8 U.S.C. Sect. 1251 (a) (4) provides that an alien may be deported from the United States if "convicted" of a "crime" involving "moral turpitude" committed "within five years after entry" and "sentenced to confinement" or "confined" therefore, in a "prison or corrective institution" for "one year more" or, if "convicted" at "any time after entry" of "two crimes ... not arising out of a single scheme of criminal misconduct" involving "moral turpitude" and regardless "of whether confined therefore" and regardless of whether the convictions "were in a single trial".

Except as noted, all concepts apply uniformly to both subsections contained within 8 U.S.C. Sect. 1251 (a) (4).

Conviction

For the most part, the discussion on judicial construction of the term "conviction" applies equally to crimes involving moral turpitude and to narcotics violations. However, there are more important exceptions with which the reader should become familiar.²

First, it should be noted that unlike the second portion of Section 1251 (a) (4), and unlike narcotics convictions, a judgment of conviction would appear to be necessary to sustain a deportation order under the first portion of Section 1251 (a) (4). This portion, unlike the other discussed *infra*, does require the imposition of a sentence, whether or not, suspended. Many

¹ The most frequently utilized sections of the Act of 1952 have already been noted, *supra*. In the event of a questionable or complex case: consult *Immigration Law and Procedure*. Volume 3, by Charles Gordon and Harry N. Rosenfield, (Matthew Bender, 1975).

² See, "How to Represent the Alien Criminal Defendant", by Peter Schey. *Dicta* 22(2). 1975.

California cases, for example, distinguish between a conviction and a judgment of conviction for certain purposes.³ The Supreme Court of California has stated:

In this case, although defendant was guilty and had been convicted, having been placed on probation in the first instance there was no existing judgment against him. Probation is not a judgment.⁴

However, if in granting probation after conviction, the trial court imposes a sentence and orders the execution thereof stayed, a judgment of conviction has been rendered.⁵ Since the alien must be "sentenced to confinement" to satisfy deportation under the first portion of Section 1251 (a) (4), a judgment of conviction must exist.

A threshold issue to be determined is whether the term "conviction" is to be defined by federal law or by state law. The difference between federal and state law, and the difference among the laws of the several states, could bear on such concepts as the finality of the conviction and the effect of expungement, both discussed *infra*.⁶ In *Arrellano-Flores v Hoy*⁷ the Ninth Circuit Court of Appeals indicated a belief that Congress had intended to do its own defining of the term "conviction". The Court herein stated:

(W)e are inclined to the belief that perhaps here, Congress intended to do its own defining rather than leave the matter to the variable state statutes. Credence for this view can be found in the fact that the present statute reads 'convicted' [8 U.S.C. 1251 (a) (11) while its predecessor, 46 Stat. 1171 (Chap. 224)], read 'convicted and sentenced'.⁸

Other courts have agreed that "Congress intended the term 'convicted' to be given meaning in light of federal law and policies rather than on the basis of 'all' the peculiarities of the laws of the various states' ".⁹ As pointed out by the First Circuit:

³ See, e.g., *In re, Marquez*, 3 Cal. 2d 625, 45P.2d 342 (1935), *People v. DeVoc*, 123 Cal. App. 233, 11 P.2d 26 (1932), *People v. Patello*, 125 Cal. App. 480, 13 P.(2d) 1068; *People v. Noone*, 132 Cal. App. 89, 22 P. (2d) 284.

⁴ *In re Marquez*, 3 Cal. 2d 625 at 627, 45 P.2d 342, at 343 (1935).

⁵ *People v. Arquello*, 30 Cal. Rptr. 333, at 334, 381 P.2d 5, at 6 (1963); *In re Phillips*, 17 Cal. 2d 55, at 58, 109 P.2d 344 (1941).

⁶ On the effect of expungement, see, "Post-Conviction Remedies", Part 4, *infra*.

⁷ 262 F.2d 667 (9th Cir. 1958), *cert. denied* 362 U.S. 921 (1960), citing *In re Morehead*, 107 Cal. App. 2d 346, 237 P.2d 2335 (1951) and *People v. Christman*, 41 Cal. App. 2d 158, 106 P.2d 32 (1940).

⁸ *Arrellano-Flores v. Hoy*, *supra*, 262 F.2d at page 668.

⁹ *Will v. Immigration and Naturalization Service*, 447 F.2d 529 at page 531 (7th Cir. 1971), citing with approval *Garcia-Gonzales v. I.N.S.*, 344 F.2d 804, 808-809 (9th Cir. 1965), *cert denied*, 382 U.S. 840, 86 S.Ct. 88, 15 L.Ed. 2d. 81.

(I)n the interest of uniform application of the federal statute, the meaning of the word 'convicted' is a federal question to be determined upon due consideration the policy which Sect. 241 (a) (4) of the Immigration and Nationality Act was designed to serve.¹⁰

Some cases, generally dealing with the question of finality of conviction, have indicated, however, that the question is not purely a federal question.¹¹ In *Matter of G.*¹² the decision of the Board of Immigration Appeals, affirmed by the Attorney General, held that an alien, whose conviction (non-narcotics) was later expunged pursuant to 1203.4 of the California Penal Code, had not been 'convicted' for purposes of Section 241 (a) (4) of the Immigration and Nationality Act. The Board stated that "(f)or purposes of the record, the State of California has wiped out the entire proceeding. There is no conviction (*Pino v. Landon*, 349 U.S. 901).¹³ It must be noted however that this concern for state action is not recognized in narcotics cases.

The Board of Immigration Appeals has set forth the following comprehensive definition of 'conviction':

For deportation purposes, a conviction exists where the following elements are present:

- 1) there has been a judicial finding of guilt,
- 2) the court takes action which removes the case from the category of those which are (actually, or in theory) pending for consideration by the court — the court orders the defendant fined, or incarcerated or the court suspends sentence, or the court suspends the imposition of sentence,
- 3) the action of the court is considered a conviction by the State for at least some purpose.¹⁴

While collateral challenges to a criminal conviction do not act to negate the finality of the conviction for deportation purposes,¹⁵ a direct appeal from the conviction robs the conviction of the finality required for deportation under 8 U.S.C. 1251 (a) (4).¹⁶ Section 242 (h), Immigration and Nationality Act, 8 U.S.C. 1252 (h), specifies that neither confinement in respect to the same offense shall be a ground for deferral of deportation.

A judgment of conviction arising out a *nolo contendere* plea is a conviction for immigration purposes; it is irrelevant how the judgment of

¹⁰ *Pino v. Nicolis*, 215 F.2d 237, 243 (1st Cir. 1954), reviewed on other grounds. *Pino v. Landon*, 349 U.S. 901, 75 S.Ct. 576, 99 L.Ed. 1239 (1955).

¹¹ *Matter of O'Sullivan*, 10 I&N Dec. 320 (L.D. 1294, 1963).

¹² *Matter of G.* 9 I&N Dec. 159, 168-169 (A.G. 1961). ¹³ *Idem.* 9 I&N Dec. at page 164.

¹⁴ *Matter of L.R.*, 8 I&N Dec. 269 (1959).

¹⁵ *Will v. I.N.S.*, 447 F.2d 529 (7th Cir. 1971).

¹⁶ *Ibid.*

conviction came about, as long as it was procured lawfully.¹⁷ However, where the alien's status is affected by his admission to a crime, rather than by his conviction,¹⁸ the plea of *nolo contendere* cannot be used to prove such admission,¹⁹ for such a plea does not admit the allegations of the charge.²⁰ Where the *nolo contendere* plea does not lead to a conviction, the plea does trigger application of Section 241 (a) (4).²¹

A state statute directed primarily at the rehabilitation and cure of persons found to require medical treatment does not qualify as a conviction for immigration purposes.²² In the case of *Holzapfel v. Wyrsh*,²³ the United States Court of Appeals for the Third Circuit held that they had to "look to the law and procedure of the state to interpret what happened in the state courts".²⁴ The alien in that case was convicted of open lewdness, but was sentenced pursuant to the New Jersey Sex Offenders Act.²⁵ Finding that the statute was aimed "primarily at rehabilitation and cure"²⁶ the court disregarded the fact that the alien received a suspended sentence to confinement concluding that the "suspended sentence was merely a technical means of enforcing the probation order and, therefore, is not within the purview of Section 241 (a) (4)" of the Act of 1952.²⁷

It should be noted that where deportation is predicted upon a "conviction", the court may look only to the judgment; the alien's testimony that he was innocent, whether given at the criminal trial or at the subsequent deportation hearing, is irrelevant.²⁸

Furthermore, application of Section 241 (a) (4) to an alien requires an actual conviction. Unlike certain statutes relating to the exclusion of aliens,²⁹ deportation cannot be predicted upon the alien's admission of a crime or upon the fact that the alien can be shown to have committed a crime.³⁰

It has been consistently held that a collateral attack to a criminal conviction

¹⁷ *United States ex rel. Bruno v. Reimer*, 98 F.2d 92 (2d Cir. 1938); *Chu v. Cornell*, 247 R.2d 929 (9th Cir. 1957), cert. den. 355 U.S. 892.

¹⁸ E.g. an alien is excludable if he admits having committed a crime involving moral turpitude, I.N. Act Sect. 212 (a) (9), 8 U.S.C. Sect. 1182 (a) (9) (1970).

¹⁹ *United States ex rel. Burno v. Reimer*, 98 F.2d 92 (2d Cir. 1938) (dictum); *In re C...*, 5 I&N Dec. 198 (1953) (dictum).

²⁰ *United States v. Weirton Steel Co.*, 62 F. Supp. 961 (N.D.W.V. 1945); *Commonwealth v. Smith*, 151 Pa. 113, 30 A.2d 339 (Super. Ct. 1943).

²¹ *Matter of C.*, 5 I&N Dec. 198 (1953).

²² *Holzapfel v. Wyrsh*, 259 F.2d 890 (3d Cir. 1958). ²³ *Ibid.*

²⁴ *Idem.*, 259 F.2d, at page 891.

²⁵ N.J.S.A. 2A: 164-6.

²⁶ *Holzapfel v. Wyrsh*, *supra*, 259 F.2d, at page 892. ²⁷ *Idem.*, 259 F.2d, at page 893.

²⁸ *United States ex Rel. Amaio v. Commissioner of Immigration*, 18 F. Supp. 480 (S.D.N.Y. 1937).

²⁹ 8 U.S.C. 1182 (a) (9), (12), and (23). ³⁰ *Mylius v. U.I.*, 210 F.2d 869 (2nd Cir. 1914).

cannot be raised in the deportation proceedings.³¹ Reviewing a deportation order based on a conviction in the State of California, the Ninth Circuit Court of Appeals, however, reversed the order finding that the alien's sentence was "void on its face for want of jurisdiction" (by the State court).³² Recent court decisions reaffirm that an attack on the constitutionality of a conviction cannot be made in the deportation arena.³³ Two earlier decisions of the Seventh Circuit Court of Appeals had indicated that collateral attack on the convictions of aliens may be appropriate where a denial of due process could be shown.³⁴ In the first of these cases, the court entertained an appeal from a denial of a writ of *habeas corpus* filed to secure release of an alien held under warrant for deportation. The writ alleged that the alien's conviction suffered various constitutional infirmities. The court reviewed each of the alien's claims and concluded that his rights were not violated in effecting his conviction.³⁵

In the second of these cases, also brought by way of *habeas corpus* petition, the alien alleged violation of the Fourteenth Amendment due process rights in procuring his conviction.³⁶ Again, while the Court of Appeals examined the alien's claims, they affirmed his conviction for deportation.³⁷ However, in later cases the Court of Appeals seems to have back-tracked its position and no longer appears willing to review such constitutional challenges in deportation proceedings.³⁸

While the Board of Immigration Appeals has generally held that foreign conviction need not meet the constitutional standards required of a conviction in the United States to serve as a basis of deportation,³⁹ the decision of the United States Court of Appeals, Second Circuit, in the case of *Lennon v. Immigration and Naturalization Service*,⁴⁰ demonstrates vitality of this position. In the Lennon case the Board of Immigration Appeals held Lennon to be excludable and deportable.⁴¹ This holding resulted from his conviction in England of possession of cannabis resin. The Court of Appeals noted that

³¹ *Rossano v. I.N.S.* 31, F.2d 971 (7th Cir. 1966); *Matter of Sirhan* 13 I&N Dec. 592 (1970); *Matter of Abi-Rached*, 10 I&N Dec. 551 (I.D. 1344, 1964).

³² *Wilson v. Carr*, 41 F.2d 704, 706 (9th Cir. 1930).

³³ *Cruz-Sanchez v. Immigration & Naturalization Service*, 438 F.2d 1087, 1089 (7th Cir. 1971) (remanded on Petition for Reconsideration after conviction vacated by trial court).

³⁴ *Marino v. Holton*, 227 F.2d 886, (7th Cir. 1955), cert. den. 350 U.S. 1006; *Durante v. Holton*, 228 F.2d 827 (7th Cir. 1956), cert. den. 351 U.S. 963.

³⁵ *Marino v. Holton*, *supra*, 227 F.2d at page 898.

³⁶ *Durante v. Holton*, *supra*, 228 F.2d at pages 828-829.

³⁷ *Idem.*, 228 F.2d, at page 830. ³⁸ See cases cited in footnotes 26 and 27, *supra*.

³⁹ *Matter of M.*, 9 I&N Dec. 132 (1960). ⁴⁰ 527 F.2d 187 (2nd Cir. 1975).

⁴¹ Pursuant to 8 U.S.C. 1182 (a) (2) (narcotics conviction) and 8 U.S.C. 1251 (a) (2) (in the United States, in violation of any law).

Lennon was convicted under a statute which made guilty knowledge irrelevant. The court concluded as follows:

Given, in sum, the minimal gain in effective enforcement, we cannot imagine that Congress would impose the harsh consequences of an excludable alien classification upon a person convicted under a foreign law that made guilty knowledge irrelevant. We hold that it did not. (Footnotes excluded).⁴²

In essence, the Lennon court was looking behind the conviction to determine the effect that it should be given in deportation proceedings. The author here believes that such an approach should be promoted, whether by way of statutory construction arguments, Fifth Amendment or Fourteenth Amendment constitutional arguments involving due process and equal protection.

Crime

For an alien to be deportable under the first portion of 8 U.S.C. 1251 (a) (4), it is necessary for the alien to have been convicted of a "crime". As noted above, deportation pursuant to 8 U.S.C. 1251 (a) (4) cannot be based upon the alien's mere admission of a crime; an actual conviction must be in effect.⁴³

The United States Court of Appeals, Ninth Circuit, summarily rejected a claim by an alien that deportation based on conviction of a state offense violated the alien's right to due process of law.⁴⁴

Both the Board of Immigration Appeals and the United States Court of Appeals, Second Circuit, have declared that an alien may be deported for conviction of a "crime" even if the violation of the statute involved is termed an "offense" by the state law.⁴⁵

The Board has held that a municipal offense for which there is no pardoning authority within the meaning of 8 U.S.C. 1251 (b) (the section providing a pardon will, under certain conditions, eliminate the crime for deportation purposes — see Part 4, *infra* for full discussion) is not a crime.⁴⁶

Furthermore, the Board of Immigration Appeals has ruled that certain offenses, seemingly not categorized as "crimes", do not subject the alien to deportation.⁴⁷ In *Matter of C.*,⁴⁸ the alien pleaded guilty to a city ordinance described as "disorderly conduct" which read in part as follows:

⁴² *Lennon v. I.N.S.*, *supra*, 527 F.2d at page 194.

⁴³ See footnote 25, *supra*, and accompanying text.

⁴⁴ *Burr v. Immigration & Naturalization Service*, 350 F.2d 87, at page 90 (9th Cir. 1965), *cert. den.* 383 U.S. 915.

⁴⁵ *Babouris v. Esperdy*, 269 F.2d 621, at page 623 (2nd Cir. 1959); *In re G.*, 7 I&N Dec. 520 (1957); *In re C.R.*, 8 I&N Dec. 59 (1958); *In re P.*, 8 I&N Dec. 424 (1959).

⁴⁶ *In re Cevallos* 12 I&N Dec. 750 (1968). ⁴⁷ *Matter of C.*, 2 I&N Dec. 367 (1945). ⁴⁸ *Ibid.*

No person shall keep a house of ill-fame, house of prostitution, assignation house... or shall in any manner contribute to the support of such a house or shall voluntarily reside therein.⁴⁹

The Board noted that the weight of authority appeared to be that enforcement of penal ordinances are in the nature of civil actions.⁵⁰ The Board further noted that the New York Court of Appeals had previously held that another ordinance, considered to be a more serious offense than that to which the alien pleaded guilty, was not a "crime" within the definition of crimes in the New York Penal Law.⁵¹ The Board concluded that the alien's conviction by the city ordinance involved did not amount to the conviction for a "crime".

The Immigration and Nationality Act contains no language averting deportation where the alien suffers a conviction for a petty offense. In contrast, and somewhat ambiguously, the laws pertaining to the exclusion of aliens have been amended to avoid hardships that would otherwise be suffered as a result of conviction for a petty offense.⁵² Pursuant to 8 U.S.C. 1182 (a) (9) an alien who has been convicted of a misdemeanor, classifiable as a petty offense under 18 U.S.C. 1 (3),⁵³ by reason of the punishment actually imposed, may be admitted to the United States if otherwise admissible. 8 U.S.C. 1251 (a) (4), the section dealing with deportation of aliens due to criminal misconduct, does not contain language similar to that found in 8 U.S.C. 1182 (a) (9) and the benefits of that language therefore cannot be claimed in deportation proceedings, unless deportation is based upon excludability at entry.⁵⁴ Given the recent decision of the United States Court of Appeals, Second Circuit,⁵⁵ holding that the Board's interpretation of 8 U.S.C. 1182 (c) denied aliens in deportation hearings of equal protection of the laws, a similar argument may be made concerning the lack of relief available in 8 U.S.C. 1182 (a) (9) cases in deportation proceedings where the alien has not departed the United States.⁵⁶

⁴⁹ *Idem.*, 1&N Dec., at page 368. ⁵⁰ *Idem.*, 2 1&N Dec., at page 370.

⁵¹ *Id. em.*, 2 1&N Dec. at pages 369-370.

⁵² Section 212 (a) (9), Immigration and Nationality Act of 1952, 8 U.S.C. 1182 (a) (9), as amended by Sect. 13, Act of September 26, 1961, P.L. 87-301, 75 Stat. 655. This section is discussed in detail in Part III, *infra*.

⁵³ A petty offense is any misdemeanor in which the possible penalty does not exceed six months confinement, and/or a maximum fine of \$500.00. 18 U.S.C. 1.

⁵⁴ *Wyngaard v. Kennedy*, 295 F.2d 184, at page 185, footnote 2 (C.A., D.C. 1961), *cert. den.* 368 U.S. 926; *Matter of M.C.*, 9 1&N Dec. 280 (1961); *Matter of D.*, 8 1&N Dec. 658 (1960).

⁵⁵ *Francis v. Immigration and Naturalization Service*, F.2d (2nd Cir. 1976) (Docket No. 74-2245, decided March 9, 1976).

⁵⁶ The Court in *Francis*, *supra*, held that Section 212(c) of the Act of 1952, 8 U.S.C. 1182 (c), which vitiates certain classes of misconduct upon the alien's entry or return to the United States, must also be available in a deportation proceeding to avoid a denial of equal protection.

The issue of whether an offense is a crime arises most frequently when the alien is a juvenile. The general rule is that juvenile delinquency is not a crime for purposes of the immigration laws.⁵⁷ The Board of Immigration Appeals had held in 1946 that the then existing deportation provisions relating to crimes involving moral turpitude did not apply to juvenile delinquents.⁵⁸ The Board later held that the comparable exclusionary provisions of the Act, which rendered excludable any alien who admits having committed a crime involving moral turpitude,⁵⁹ was also inapplicable to an alien tried in juvenile proceedings.⁶⁰ The Board there cited *In re O'N*⁶¹ as authority for the proposition that juvenile delinquency is not a crime.

The essential point to be noted from all these decisions, and one which may have a direct bearing on pre-trial strategy, is that the distinction turns on the type of proceedings in which the alien is tried; juvenile proceedings do not give rise to a crime; and criminal proceedings, even if the defendant is in fact a juvenile, do give rise to a crime upon conviction.⁶²

The United States Court of Appeal, Ninth Circuit, refused to overturn a deportation order issued pursuant to 8 U.S.C. 1251 (a) (4) in a case in which the alien was 18 years old at the time of conviction but was treated as an adult offender.⁶³ The alien was convicted in an Oregon Court that could have treated him as a juvenile offender, but determined not to do so. The Ninth Circuit simply concluded that "we are (not) required to import separate juvenile proceedings which were not used by the Oregon court".⁶⁴

However, it has also been held that a juvenile alien's conviction may not support a deportation order where the no separate state juvenile procedure existed at the time of conviction.⁶⁵ In the case of *Tutrone v. Shaughnessy*⁶⁶ a federal district court disallowed deportation of an alien who suffered a youthful prosecution at a time when New York State did not have a juvenile procedure for handling offenders of the alien's age. The district court supplied the procedure *ex post facto*, relying in part on the alien's sentence to an institution for juveniles.⁶⁷

Under federal law, a juvenile alleged to have violated a federal statute not punishable by death or life imprisonment, and not surrendered to state

⁵⁷ *In re C.M.* 5 I&N Dec. 327 (1953); *In re O'N.* 2 I&N Dec. 319 (A.G. 1945).

⁵⁸ *In re E.* 2 I&N Dec. 517 (1946).

⁵⁹ *In Act* Sect. 212 (a) (9), 8 U.S.C. Sect. 1182 (a) (9) (1970).

⁶⁰ *In re C.M.* 5 I&N Dec. 327 (1953). ⁶¹ 2 I&N Dec. 319 (A.G. 1945).

⁶² *In re C.M.* 5 I&N Dec. 327 (1953).

⁶³ *Morasch v. Immigration & Naturalization Service*, 363 F.2d 30 (9th Cir. 1966).

⁶⁴ *Idem.* 363 F.2d, at page 31.

⁶⁵ *Tutrone v. Shaughnessy*, 160 F.Supp. 433 (S.D.N.Y. 1958); *Matter of O'N.* 2 I&N Dec. 319 (A.G. 1945).

⁶⁶ 160 F.Supp. 433 (S.D.N.Y. 1958). ⁶⁷ *Ibid.*

authorities, has the right to be proceeded against as a juvenile delinquent, rather than as a criminal, unless the Attorney General expressly directed otherwise.⁶⁸ A juvenile is defined as a "person who has not attained his eighteenth birthday", and juvenile delinquency as a "violation of a law of the United States committed by a juvenile and not punishable by death or life imprisonment".⁶⁹

In *United States v. Webb*⁷⁰ the court held a juvenile must be advised of his right to be tried in juvenile proceedings, unless the Attorney General has expressly directed otherwise. Citing *United States v. Fotto*,⁷¹ the court reasoned that the statute had been designed to spare youths from the permanent stigma of a conviction, and to encourage them to obey the law.

Noting the statute does allow the Attorney General to direct that the accused be tried in criminal proceedings, the court went on to hold that such a direction cannot be implied solely from the actions of the United States Attorney in prosecuting the case. Finally the court ruled that the proper remedy for a juvenile denied this important right is to move the court which imposed the sentence to vacate, set aside, or correct the sentence. Such a motion can be made at any time, and unless the records conclusively show no relief is justified, the court must grant a hearing on the motion.⁷²

It has been held that under-18 age requirement is satisfied when the accused was under age 18 at the time of the alleged offense, even if he is over age 18 at the time of the proceedings.⁷³

The Federal Youth Corrections Act,⁷⁴ in carving out another age category of those who have committed offenses, allows the judge to sentence the convicted "youth offender" to the custody of the Attorney General for treatment and supervision in lieu of imprisonment under other applicable provisions of law.⁷⁵ For this purpose a youth offender is defined as "a person under the age of twenty-two years at the time of conviction".⁷⁶

Moral Turpitude

Each portion of 8 U.S.C. Sect. 1251 (a) (4) requires that the crime in question involve "moral turpitude". This term was first introduced in the Immigration Act of 1917.⁷⁷

Although the term has been subjected to various interpretations, the Supreme Court has resisted a constitutional challenge predicated on vagueness.⁷⁸

⁶⁸ 18 U.S.C., Sect. 5032 (1969). ⁶⁹ 18 U.S.C., Sect. 5031 (1969).

⁷⁰ 112 F. Supp. 950 (W.D. Okla. 1953). ⁷¹ 103 F. Supp. 430 (S.D.N.Y., 1942).

⁷² 28 U.S.C. Sect. 2255 (1964).

⁷³ *United States v. Fotto*, 103 F. Supp. 430 (S.D.N.Y. 1942).

⁷⁴ 18 U.S.C. Sect. 5005-5026 (1969). ⁷⁵ *Idem.*, Sect. 5010 (b). ⁷⁶ *Idem.*, Sect. 5006 (e).

⁷⁷ Section I, Immigration Act of March 4, 1891, 26 Stat. 1084.

⁷⁸ *Chu v. Cornell*, 247 F.2d 929 (9th Cir.), cert. denied 355 U.S. 892 (1957).

It has been assumed that Congress intended the term to reflect changing social norms.⁷⁹

Probably, the most widely accepted definition of moral turpitude is "an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man".⁸⁰

Other decisions have looked for the presence of a vicious motive or corrupt mind, thus focusing on the alien's intent.⁸¹

Still another approach has been to find moral turpitude in:

those acts or omissions which are so far 'contrary to the moral law, as interpreted by the general moral sense of the community, that the offender is brought to public disgrace, is no longer generally respected, or is deprived of social recognition by good living persons'.⁸²

The Board of Immigration Appeals has commented that moral turpitude is not ordinarily found "in conduct, which before it was made punishable as a crime, was not generally regarded as morally wrong, or as offensive to the moral sense of the community",⁸³ and that "(i)t would seem that moral turpitude should not be attached to the commission of an act which, though immoral, is not even regarded as a crime in some communities, and is one which the courts have held would not cause the 'common conscience' to strip its perpetrator of good moral character".⁸⁴ The repetition of an act does not clothe it with moral turpitude.⁸⁵

Not all felonies are crimes involving moral turpitude,⁸⁶ and not all crimes involving moral turpitude are felonies.⁸⁷ Nor is it controlling whether the crime would have been categorized as "infamous".⁸⁸ Similarly, the gravity of the punishment is not controlling.⁸⁹

⁷⁹ *Iorio v. Day*, 34 F.2d 920, (Cir. 1929).

⁸⁰ *Ng Sui Wing v. United States*, 46 F.2d 755, 756 (7th Cir. 1931). See also, *Tutrone v. Shaughnessy*, 160 F.Supp. 433 S.D.N.Y. 1958); *In re Henry*, 15 Idaho 755, 99 P. 1054 (1909). *C.F. United States ex rel. Mongiovi v. Karnuth*, 30 F.2d 825 (W.D.N.Y. 1929).

⁸¹ *In re Bem*, 6 I&N Dec. 98, 107 (1954); *In re Rom*, 2 I&N Dec. 117, 121 (1944).

⁸² *In re Rom*, 6 I&N Dec. 444, 452, (1954); *In re Dom*, 1 I&N Dec. 190, 194 (1942).

⁸³ *In re Re*, 6 I&N Dec. 444, 452, (1954), citing *Cey Kendall v. Skrmetta*, 22 F.2d 120 (5th Cir. 1927).

⁸⁴ *In re R*, 6 I&N Dec. 444, 454 (1954). ⁸⁵ *Idem*.

⁸⁶ *Mongiovi v. Karnuth*, 30 F.2d 825 (W.D.N.Y. 1929).

⁸⁷ *Gonzales v. Barber*, 207 F.2d 398 (9th Cir. 1953), aff'd 347 U.S. 637 (1954); *Tillinghast v. Edmead*, 31 F.2d 81 (1st Cir. 1929).

⁸⁸ *United States v. Carollo*, 30 F.Supp. 3 (W.D. Mo. 1939).

⁸⁹ *Gonzales v. Barber*, 207 F.2d 398 (9th Cir.) aff'd 347 U.S. 637 (1953); *United States ex rel. Zaffarano v. Corsi*, 63 F.2d 757 (2d Cir. 1933); *United States ex rel. Mongiovi v. Karnuth*, 30 F.2d 825 (W.D.N.Y. 1929).

A difficult problem is presented by the question of what the court may peruse to determine whether the crime is one involving moral turpitude. The majority rule appears to be that the court may not inquire into the circumstances of the crime, and that moral turpitude must be inherent in the crime as charged; i.e., the crime as charged must be one necessarily involving moral turpitude.⁹⁰

The Board of Immigration Appeals, which is, of course, bound by the judicial decisions on this issue,⁹¹ has followed the above limitation.⁹² The Board has summarized the reasons for the rule as follows:

(A) standard must be supplied to administrative agencies; it eliminates the burden of going into the evidence in a case; it eliminates the situation where a nonjudicial agency retries a judicial matter; and it prevents the situation occurring where two people convicted under the same specific law were given different treatment because one indictment may contain a fuller or different description of the same act than the other indictment;⁹³ and makes for uniform administration of law.⁹⁴

Some courts have departed from the general rule by inquiring whether the crime in its general nature would in common usage, be classified as one involving moral turpitude.⁹⁵ As noted by Wexler and Neet in an excellent discussion of moral turpitude, this minority position "would operate to deport an alien convicted of a crime 'commonly' regarded as involving moral turpitude, even though the particular offense committed by the alien

⁹⁰ Most courts have adhered to this view. See e.g., *Rossano v. I.N.S.*, 377 F.2d 971 (7th Cir. 1966); *Wadman v. I.N.S.* 329 F.2d 812 (9th Cir. 1964); *Ablett v. Brownell*, 240 F.2d 625 (D.C.Cir. 1957); *McKenzie v. Savoretti*, 200 F.2d 546 (5th Cir. 1952); *Guarino v. Uhl*, 107 F.2d 399 (2d Cir. 1939); *United States ex rel. Robinson v. Day*, 51 F.2d 1022 (2d Cir. 1931); *United States ex rel. Mylius v. Uhl*, 210 F.860 (2d Cir. 1914); *United States ex rel. Teper v. Miller*, 87 F.Supp. 285 (S.D.N.Y. 1949); *United States ex rel. Manzella v. Zimmerman*, 71 F.Supp. 534 (E.D. Pa. 1947); *United States ex rel. Chartrand v. Karnuth*, 31 F.Supp. 799 (W.D.N.Y. 1940); *United States ex rel. Friffo v. McCandless*, 28 F.2d 287 (D.C. Pa. 1928); *United States ex rel. Portada v. Day*, 16 F.2d 328 (S.D.N.Y. 1926).

⁹¹ *In re R.*, 6 I&N Dec. 444, 445 (1954).

⁹² *Idem.* at 448; *In re S.*, 2 I&N Dec. 353, 357, 361 (1945); *In re E.*, 2 I&N Dec. 134, 145 (1944).

⁹³ The motion that this rule will prevent differing treatment based on differing indictments is misleading. As discussed, *infra*, the court is permitted to view not only the statute allegedly violated, but also the record of conviction, which includes the indictment. Thus a rule prohibiting examination of the circumstances (e.g. the trial transcript or the alien's testimony at the deportation hearing) actually operated to increase the probability of differing treatment based on differing indictments.

⁹⁴ *In re R.*, 6 I&N Dec. 444, 448, n.2 (1954).

⁹⁵ *Marciano v. I.N.S.* 450 F.2d 1022 (8th Cir. 1971); *Pino v. Nicolls*, 215 F.2d 237 (1st Cir. 1954).

did not itself involve moral turpitude".⁹⁶

Whichever of the above tests the court or administrative agency uses, it is well settled that the circumstances of the commission of the crime should not be scrutinized. The particular statute or law violated by the alien must be examined. Deportability attaches only if the statute or law in question involves moral turpitude under every possible circumstance.⁹⁷ As stated by Circuit Judge Learned Hand:

When by its definition it (statute alien convicted of) does not necessarily involve moral turpitude, the alien cannot be deported because in the particular instance his conduct was immoral.⁹⁸ (Citations omitted).

In a decision two years later, the same court again overturned a deportation order where the alien was convicted of second degree assault but the indictment was not introduced as evidence and the statute "may have involved moral turpitude, or it may not".⁹⁹

Upon a petition for rehearing, the court held, *per curiam*, that:

(N)either the immigration officials nor the court reviewing their decision may go outside the record of conviction to determine whether in the particular instance the alien's conduct was immoral. And by the record of conviction we mean the charge (indictment), plea, verdict, and sentence.¹⁰⁰

This view has been adopted by the Board of Immigration Appeals both in cases in which the statute is unclear as to whether or not moral turpitude is an element of violation of the statute, and in cases in which the statute is divisible into portions involving and not involving moral turpitude.¹⁰¹ The Board has concluded that "(w)here the record of conviction is of not assistance in determining the moral obloquy of the crime, a finding of moral turpitude cannot be made".¹⁰²

Committed Within Five Years After Entry

Only the first portion of Section 1251 (a) (4) requires that the crime must have been committed within five years after "entry". Entry has been statutorily defined as:

(A)ny coming of an alien into the United States, ...whether voluntary

⁹⁶ Wexler and Neet, *The Alien Criminal Defendant: An Examination of Immigration Law Principles for Criminal Law Practice*, 10 *Crim L. Bull.* 289, 302 (1974).

⁹⁷ *Guarino v. Uhl*, 107 F.2d 399 (2nd Cir. 1939); *Manzella v. Zimmerman*, 71 F. Supp. 534 (E.D. Pa. 1947); *Mylus v. Uhl*, 210 Fed. 860 (2nd Cir. 1914).

⁹⁸ *United States ex rel. Robinson v. Day*, 51 F.2d 1022, 1022-1023 (2nd Cir. 1931).

⁹⁹ *United States ex rel. Zaffarano v. Corsi*, 63 F.2d 757, 758 (2nd Cir. 1933). ¹⁰⁰ *Idem*.

¹⁰¹ *Matter of Chunaim*, Int. Dec. No. 2372 (1975); *In the Matter of B*, 6 I&N Dec. 98 (1954).

¹⁰² *In the Matter of C*, 5 I&N Dec. 65, 71 (1953).

or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place ... was not intended or reasonably to be expected by him or his presence in a foreign port or place... was not voluntary...¹⁰³

The leading case of *Rosenberg v. Fleuti*,¹⁰⁴ further allowed that an alien does not depart the United States, and therefore, does not make an "entry" upon returning to the United States, when the alien's intent upon leaving the country does not manifest "an intent to depart in a manner, which can be regarded as meaningfully interruptive of the alien's permanent residence".¹⁰⁵ The practitioner should consult the *Fleuti* case, and other cases cited in the footnotes below, to comprehend fully the importance of the term "entry".

Confined or Sentenced to Confinement for One Year or More

This requirement applies only to the first portion of Section 1251 (a) (4). The Court desiring to suspend a person's sentence may approach sentencing in two distinct ways. It may suspend execution of the sentence whatsoever, or, it may suspend execution of the sentence that it does impose. A sentence which is imposed but not executed is deemed to be a "sentence to confinement" for purposes of Section 1251 (a) (4). In contrast, where imposition of the sentence is suspended, no sentence exists for the first portion of Section 1251 (a) (4).¹⁰⁶ In a recent case coming from a jurisdiction which only has "suspension of imposition" and not "suspension of execution" of the sentence (Texas), the Board held that a rendition of judgment which stated that the petitioner should be confined for a three year term, but which "suspended imposition of sentence", and granted probation, was not a sentence to confinement for more than a year.¹⁰⁷

Committing a youth under the Federal Youth Corrections Act¹⁰⁸ is not considered to be a sentence of confinement. The Board has likewise held that commitment under a state juvenile program does not amount to a "sentence" to confinement.¹⁰⁹

¹⁰³ 8 U.S.C. Sect. 1101 (a) (13). ¹⁰⁴ *Rosenberg v. Fleuti*, 374 U.S. 449 (1963).

¹⁰⁵ 374 U.S. 449, 462 (1963) See also, *United States v. Oscar*, 496 F.2d 492 (9th Cir. 1974); *Matter of Accardi*, Interim Dec. No. 2206 (1973); *Chang v. Immigration and Naturalization Service*, 534 F.2d 1018 (2nd Cir. 1976).

¹⁰⁶ *In re V—* 7 I&N Dec. 577 (1957). Note that a sentence to probation does not equal a sentence to confinement for purposes of Section 1251 (a) (4). See, *In re V—* *supra*.

¹⁰⁷ *Matter of de la Cruz*, Interim Dec. No. 2482 (1976). ¹⁰⁸ 18 U.S.C. Sect. 5005-5026 (1969).

¹⁰⁹ *In re N—* 8 I&N Dec. 660 (1960), overruling *In re C—R—* 4 I&N Dec. 136 (1950).

Whether or not an alien has actually served more than one year in confinement, if the sentence is lawfully vacated to less than one year, the sentence no longer requires deportation under Section 1251 (a) (4).¹¹⁰ However, if an alien receives an indeterminate sentence which could last more than one year, the one-year requirement of Section 1251 (a) (4) is satisfied whether or not the alien actually serves more than one year.¹¹¹

Not Arising From a Single Scheme

This requirement is only applicable to the second portion of Section 1251 (a) (4), which requires deportation of any alien convicted of two crimes, any time after entry, "not arising out of a single scheme of criminal misconduct".

The burden lies with the government to establish that the two involved crimes did not arise from a single scheme of misconduct.¹¹² "(C)omplete crimes committed on differing days or in differing places are considered separate and different crimes, and support separate charges".¹¹³

JUDICIAL RECOMMENDATION AGAINST DEPORTATION

Deportation under Section 1251 (a) (4) may be avoided if the sentencing judge issues a recommendation against deportation under the terms of 8 U.S.C. Sect. 1251 (b). This recommendation does not effect convictions for narcotics offenses. Section 1251 (b) provides:

(I)f the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the (INS) Service, and Prosecution authorities, who shall be granted an opportunity to make representations in the matter.

If the basic requirements of the statute are followed, and a judge issues a recommendation against deportaton, that recommendation is mandatory and must be followed by the Service.¹¹⁴ It would seem as if such a judicial recommendation also precludes the Service from considering the conviction for other purposes involving discretionary relief.¹¹⁵

¹¹⁰ *In re H—*, 91 & N Dec. 380 (1961).

¹¹¹ *Petsche v. Clingan*, 273 F.2d 688 (10th Cir. 1960).

¹¹² *Matter of Pataki*, Interim Dec. No. 2390 (1975).

¹¹³ *Chanan Din Khan v. Barber*, 253 F.2d 547, 549 (9th Cir.) cert. den., 357 U.S. 920 (1958).

¹¹⁴ *Velez-Lozano v. Immigration and Naturalization Service*, 463 F.2d 1305 (D.C. Cir. 1972).

¹¹⁵ *Giambanco v. Immigration and Naturalization Service*, 531 F.2d 141, 147-149 (3rd Cir. 1976).

The notice requirements of this statute are also mandatory and are generally strictly construed. Since a recent decision in the Seventh Circuit Court of Appeals reversed a deportation order where the alien received a judicial recommendation against deportation, however, the Service was not notified that the application was made to the sentencing judge.¹¹⁶ The sentencing judge was still available and willing to reconsider his recommendation after hearing from the Service. There was no evidence that the failure to notify the Service was intentional. The case was remanded in order to provide the Service with an opportunity to present its views to the sentencing judge.

Where a sentence is vacated, not solely for purposes of bringing into play a judicial recommendation against deportation, an application for such a recommendation may be made at the time of resentencing.¹¹⁷

SOME POST-CONVICTION REMEDIES AVAILABLE TO THE ALIEN

Expungement

Expungement of a conviction will preclude its use for purposes of deportation under Section 1251 (a) (4). Expungements under different statutes that may be available to the convicted alien do not necessarily assist the alien convicted of a narcotics offense.

A person convicted under the Federal Youth Offenders Act ¹¹⁸ may be defined as a "youth offender" if the person was under twenty-two years of age at the time of conviction, or the person may be defined as a "young adult offender" if under the age of twenty-six.¹¹⁹ A person so convicted is deportable until such time as the conviction is expunged.¹²⁰ It has been held that an expungement under the Federal Youth Offenders Act also removes the conviction for certain narcotic offenses.¹²¹

Expungement under state law also removes the conviction from consideration in deportation proceedings under Section 1251 (a) (4). State laws should be consulted to determine when and how such expungement may be applied for.¹²²

¹¹⁶ *Juan Naya Cerujo v. Immigration and Naturalization Service*, F.2d (7th Cir. 2/13/78, No. 77-1464).

¹¹⁷ *In re P—*, 9 I&N Dec. 293 (1961); *Piperkoff v. Esperdy*, 267 F.2d 72 (2d Cir. 1959).

¹¹⁸ 18 U.S.C. Sect. 5005-5026 (1969).

¹¹⁹ 18 U.S.C. Sect. 4216 (1976).

¹²⁰ *Hernandez-Valensuela v. Rosenberg*, 304 F.2d 639 (9th Cir. 1962).

¹²¹ *Mestre-Moreira v. I.N.S.*, 462 F.2d 1030 (1st Cir. 1972).

¹²² *In re Gutnick*, 13 I&N Dec. 672 (1971).

Vacating Judgement

A vacated judgment cannot serve as the basis for deportation under Section 1251 (a) (4).

In federal court a prisoner in custody under sentence of a court may move the court which imposed the sentence to vacate it on the grounds that the sentence was imposed in violation of the Constitution or laws of the United States.¹²³ Such a motion may be made at any time after sentencing. This motion is deemed to be a collateral civil proceeding.¹²⁴

If the alien is no longer in custody, a writ of error *coram nobis* may be brought to vacate or correct a sentence. This writ is considered to be an "extraordinary writ" only available when "no other remedy is available" to a person.¹²⁵ To obtain a writ of error *coram nobis*, the applicant must show that 1) a factual matter was unknown to the court at the time of sentencing; 2) it was not the applicant's fault that such factual matter was not known to the court; and 3) possession of such knowledge would have prevented rendition of the judgment that issued.¹²⁶

Under Rule 35, Federal Rules of Criminal Procedure, a court is empowered to reduce a legal sentence or to correct a legal sentence allegedly imposed in an illegal manner. These two remedies must be pursued within 120 days after the original sentence was imposed. A motion to correct an illegal sentence under Rule 35, or a motion to vacate, set aside, or correct a sentence under 28 U.S.C. Sect. 2255, may be made at any time. Rule 35 motions are strictly construed as to time.¹²⁷ The person filing such a motion need not be in custody when the motion is filed.¹²⁸

Under Rule 11, Federal Rules of Criminal Procedure, a court may not accept a guilty plea "without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea".¹²⁹ Failure to adhere to this requirement may allow the alien defendant to set aside the original plea and enter a new plea.¹³⁰

A motion to set aside a plea in federal court should be made under the terms of Rule 32 (d) which provides:

A motion to withdraw a plea of guilty or *nolo contendere* may be

¹²³ 28 U.S.C. Sect. 2255 ¹²⁴ *Martin v. United States*, 273 F.2d 775 (10th Cir. 1960).

¹²⁵ *Farnsworth v. United States*, 232 F.2d 59 (D.C. Cir. 1956).

¹²⁶ *Gomori v. Maroney*, 196 F.Supp. 190, 191 (W.D. Pa. 1961).

¹²⁷ *United States v. Hamilton*, 391 F.Supp. 1090 (W.D. Miss. 1975).

¹²⁸ *Heflin v. United States*, 358 U.S. 415 (1959).

¹²⁹ Federal Rule of Criminal Procedure, Rule 11.

¹³⁰ *McCarthy v. United States*, 394 U.S. 459 (1969); *United States v. Aleman*, 417 F.Supp. 117, 119-120.

made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence, may set aside the judgment of conviction and permit the defendant to withdraw his plea.

Deportation has been held to be a collateral consequence of a plea and many courts have held that failure to advise an alien defendant of such a consequence does not allow for withdrawal of the plea.¹³¹ One case has allowed such withdrawal.¹³² Generally the courts seem to hold that while "it is the better practice to inform a defendant of the potential collateral consequences of his guilty plea, it is not error to fail to do so".¹³³ At least one Court of Appeal has noted that the question is a close one where 1) the applicant does not delay in bringing the motion, and 2) the government is not prejudiced by reliance on the original plea.¹³⁴

Many state remedies may also exist for state court convictions allowing for the vacation of sentence.¹³⁵ State law should be consulted for the appropriate standards and procedures to be used.

PARDON

8 U.S.C. 1251 (b) provides that the provisions of Section 1251 (a) (4) shall not apply where the alien has, after conviction, been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several states. Such a person may not be deported and the Service may not look behind the pardon in an effort to continue deportation under Section 1251 (a) (4).¹³⁶ A foreign pardon does not satisfy the requirements of this section.¹³⁷ The pardon must be issued in the United States for a conviction suffered in the United States.¹³⁸ Finally, it should be noted that a pardon will not stop deportation proceedings based on a narcotics conviction.

CONCLUSION

This analysis has not concerned itself with convictions under narcotic laws.

¹³¹ *Nunez-Cordero v. United States*, 533 F.2d 723 (1st Cir. 1976); *Fruchtman v. Kenton*, 531 F.2d 946 (9th Cir. 1976).

¹³² *United States v. Shapiro*, 222 F.2d 836 (7th Cir. 1955).

¹³³ *Marshall v. United States*, 389 F.Supp. 729 (1975).

¹³⁴ *Nunez-Cordero v. United States*, *supra*.

¹³⁵ *People v. Wiedersperg*, 44 Cal. App. 3d 550 (1975); *People v. Superior Court*, 64 Cal. App. 3d 710 (1976); *People v. Superior Court*, 11 Cal. 3d 793, 523 P.2d 636 (1974); *see e.g.*, California Penal Code Section 1018.

¹³⁶ *Taran v. United States*, 266 F.2d 561 (8th Cir. 1959).

¹³⁷ *Marino v. I.N.S.*, 537 F.2d 686, 691 (2d Cir. 1976).

¹³⁸ *Mercer v. Lence*, 96 F.2d 122 (10th Cir.) *cert. den.* 305 U.S. 611 (1938).

Such convictions frequently lead to deportation and must be examined just as carefully as convictions for other crimes involving "moral turpitude" which have been analyzed in this paper.

As has been noted by many jurists, deportation is a punishment that frequently results in the permanent separation of families, and a total loss of the liberties guaranteed by the United States Constitution. Prior to resolving any matter in which an alien is facing criminal penalties, the Court should be made thoroughly aware of the deportation consequences to the alien and his/her family. This paper has only scratched the surface of the deportation consequences of an alien's conviction, and has not discussed the exclusionary consequences raised in 8 U.S.C. Sect. 1182. Once an alien has been represented in a manner that will avoid future deportation, the alien should immediately be referred to an immigration specialist for an analysis of the applicable exclusionary statutes, particularly if the alien may desire at some point in the future to temporarily depart the United States.

This paper should only be used as a starting point for research without which the practitioner may inadvertently become responsible for a grave error in justice and judgment.

Appeal, Judicial Review and Motion Practice

CHARLES GORDON*

THE deportation aspect of the immigration process, being quasi-judicial in nature, follows the elements of due process of law. Over the years, proceedings in the immigration process have become increasingly formal and have provided various protections to the alien. In these proceedings, the presiding officer is the Immigration Judge and any determination in an exclusion and deportation proceeding is made by him. All of us would agree that these Immigration Judges do a reasonable job in trying to act fairly. Of course, many of these judges have come up through the enforcement ranks and some have not quite shed the biases of their previous positions. Point of fact, they are asked to administer a difficult law and, while they try to accord their actions and decisions to due process, they do, at times, make mistakes. When these mistakes occur, there are remedies.

REOPENING AND RECONSIDERATION

The motion for reopening and reconsideration is something of which the ordinary practitioner may not be fully aware. Yet, it can fulfill important functions when used. It is important to bear in mind that there is no form prescribed for the reconsideration motion. So, you must prepare your own form provided you present something substantial and reasonable.

The motion is always addressed to the last agency which made the decision. If the last agency was the Board of Immigration Appeals, then the motion is addressed to the Board. If the last agency was the Immigration Judge, then the motion is addressed to him. However, like all papers, the motion must be filed with the District Director.

There is no time limit on this motion. It can be made anytime after the original decision, provided the decision has not been executed. However, you must state new facts to be proved at the re-opened hearing supported

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by affidavits and evidentiary materials. You must present materials, arguments and facts which were not presented at the prior hearing. If new facts and circumstances are alleged they must be proved. If a marriage has taken place, a certification of marriage must be presented. You cannot leave to the adjudicating officer the task of piecing together the picture. Remember, therefore, that while you can make any number of motions and while there are no time limits, regulations require that you show why you did not make these motions at the prior hearing and what new facts are involved.

If you want to apply for discretionary relief, suspension of deportation, or adjustment of status and if it is available at the time of the hearing, it is best to ask for it at the hearing. There is a regulation which states that if you did not present your request at the hearing, you lose the right to make it. Remember, new evidence can be alleged in support of a motion for reconsideration only if it was not available at the prior hearing. For example, the subject of the deportation proceeding may have in the interim, married an American citizen and is now eligible for an adjustment of status. Thus, it becomes necessary for the practitioner to make a motion for reconsideration accompanied by a Visa Petition (Form I-130) and an application for adjustment of status with the accompanying Form I-485.

Another reason for reconsideration might be a change in the law itself. The 1976 Western Hemisphere statute provided for adjustment of status for aliens from the Western Hemisphere. In this case the opportunity to look for reopening was provided for people who previously had been barred from seeking an adjustment of status.

One important point is that the motion for reopening does not stay deportation. A stay of deportation may be required from the Immigration Judge, the District Director, or the Board of Immigration Appeals. If you present good grounds for a stay the Board will grant it.

Until recently, the fee for a motion for reconsideration was \$50.00. Through litigation, I was instrumental in having the fee reduced to \$25.00.

THE BOARD OF IMMIGRATION APPEALS

Most who practice in the immigration field hold a high regard for the Board of Immigration Appeals. Do not feel that an appeal to the Board of Immigration Appeals would be futile. If you present a reasonable argument, they will extend themselves to achieve a fair result.

To proceed it is necessary to go to the Board through a Notice of Appeal (Form I-290A). This must be filed with the District Director, not with the Board, within a ten day period after the decision in the deportation case (three days added if that decision was mailed) resulting in a ten to thirteen day period in such cases. Here, the fee required to accompany the notice of appeal is \$50.00. The Notice of Appeal must state the reasons for appeal as

well. If you do not state the reasons, the appeal is subject to summary dismissal.

The record on appeal is not assembled by us as practitioners. Rather, it is assembled by the District Director. It is also his responsibility to get the record and transmit it to the Board of Immigration Appeals. Remember, the Board is separate from the Immigration and Naturalization Service. It is an arm of the Attorney General and responsible just to him. It is in no way connected with the Immigration and Naturalization Service apart from the fact that they are both in the Department of Justice.

Usually you apply to the Immigration Judge or the District Director for time to file a brief. Our practice is to ask for it at least ten days after we receive the record. Oral argument will be granted to anybody who appeals in a deportation case if he asks for it. This does not apply to appeals made from a denial for Motion for Reconsideration. Oral argument is rare in those cases and will be granted only by special dispensation of the Board. Stay of deportation is automatic on appeal from a deportation order to the Board of Immigration Appeals. There is no automatic stay if it is an appeal from a denial of a Motion for Reconsideration. You then have to ask for a stay. Except in rare cases where the Attorney General can be asked to review, the decision of the Board of Immigration Appeals is the final disposition.

JUDICIAL REVIEW

It is here that the most dramatic changes have taken place. The major battles occur in the courts; where the great issues are formulated and where great issues are decided. I have been exposed to judicial review for many years and I am always astonished at the changes that take place. I, therefore, urge you not to be afraid of what the courts have decided when the proper circumstances are presented.

The right of judicial review has developed, in the absence of a statute, as an aspect of due process. In 1961 the Congress codified a right to judicial review which now appears in Section 106 of the Immigration and Nationality Act, as amended. In deportation cases, this is a direct review from the Board of Immigration Appeals to the appropriate United States Court of Appeals.

Remember, however, only final orders are reviewed by the court. That is, you cannot rush into court when the Immigration Service starts a deportation proceeding. The court will no doubt reject your application unless there is a final order involved. Another principle known to lawyers is the practice of following through the administrative process to its completion. You must make use of all available appeals. If you have a deportation order and you have not taken advantage of your right to appeal to the Board of Immigration Appeals, but go directly to the court, you will be out of luck. The court will

say that you failed to exhaust your administrative remedies, and that principle is incorporated in Section 106 of the statute. There may be some preliminary determinations which are, of their nature, final, such as the denial of bail.

Another aspect of the principle of exhaustion of remedies is that you must raise before the administrative tribunal all the issues you want to raise in court. You cannot dream up issues for the first time in court. You ordinarily must present your issues to the administrative body.

PETITION FOR JUDICIAL REVIEW OF FINAL DEPORTATION ORDER

The 1961 statute and the direct appeal to the United States Court of Appeals known as a Petition for Review, provided for specifically in Section 106, says that this shall be the exclusive method of reviewing a final order of deportation. Exclusive may sound final but the statute has not worked out that way. It is really only exclusive to some extent.

Although this statute speaks of final deportation orders, three Supreme Court decisions have had occasion to construe what the statute means. I think the third Supreme Court decision really impaired what those who enacted the statute had in mind. They wanted to make one remedy available where everything could be settled in court. The courts have said that everything that happens in the hearing process itself is part of the deportation order. It is all part of the package which makes up final deportation orders. They have also said that the denial of a motion to re-open the order is part of the same package. Yet, in the last of the three decisions, the Supreme Court in *Kwok v. the Immigration and Naturalization Service* felt that ancillary determinations, which are not in the proceedings themselves, are not part of the final deportation order. This would mean that if deportability hinges on something which took place before the proceedings started, it cannot be challenged in this special review proceeding. This would also apply to something which happened after the final proceedings and was not within the proceeding itself or a motion to re-open. Those ancillary determinations cannot be challenged separately. So we have, in effect, a negation of the objective of the 1961 Act to make only one review package. There may, indeed, be several review packages. One package deals with the final deportation order. Other packages deal with ancillary determinations which are not part of the deportation proceeding. For example, many litigations are challenging the denial of labor certification. This is not part of the deportation proceeding itself. Denial of a visa petition under the current procedure is not part of the deportation proceedings. This too can be reviewed in the United States District Court. Even the denial of waiver of an exchange visitor falls under this category.

Regardless of what you are challenging, the filing of the petition for review challenging the order of deportation itself, stays the order of deportation

unless the court otherwise directs. In that event, room is left for the government to dissolve this stay on the ground that the action is frivolous, repetitious or inappropriate. However, until the court acts, filing the petition is a great advantage to lawyers. Because all you have to do is file that petition for review in the court and the deportation is stayed.

Another feature of the judicial review statute is that the records and the briefs do not have to be printed. This is a concession made in the statute to those who complained that Congress was being too tough on this point. The briefs can be typewritten.

HABEAS CORPUS

Habeas corpus is the original, traditional remedy through which virtually all the basic law developed in the field. The reason for this seems obvious, in that there was not a statutory remedy. There existed no remedy which persons could take advantage of to challenge the legality of deportation orders. Habeas corpus was initially appropriate because until around 1956 every deportation case was started by an arrest and habeas corpus has been traditionally available for challenging the legality of official detention. The Constitution safeguards the privilege of the writ of habeas corpus and states that it shall not be suspended except in cases of invasion or insurrection. Habeas corpus is designed to be an expeditious remedy because of the custody situations it addresses. The jurisdiction is fixed in a habeas corpus case as soon as a petition for a writ of habeas corpus is filed in the U.S. District Court. This is important because in the past we have had a Commissioner who made it his business to try to rush people outside the jurisdiction of the court before the court could act.

Once the petition is filed, the court's jurisdiction is fixed, you do not need any stay, and the court will retain jurisdiction until it acts and makes a final disposition. The habeas corpus proceeding is only brought against the person who has custody, according to a court decision of about 20 years ago. Usually, this is the District Director. There are some recent Supreme Court decisions in military cases, but as of now this is the rule. The normal procedure which the statute follows is that once you file the petition, the court issues a writ of habeas corpus.

However, depending on the particular court, an alternative procedure which many courts use in an order to show cause why a writ should not be issued. This avoids bringing a petitioner to court unless the court directs. The writ of habeas corpus with regard to custody, developed in the English common law to see why people were in jail and to determine, through a judicial process, whether they were being held illegally. As a result of the case of *Jones v. Cunningham* 371 U.S. 236 (1963), a liberalized concept has developed. Now you do not need actual custody anymore for a writ of habeas corpus.

A person on parole or experiencing any other restraint of liberty can challenge that restraint through habeas corpus. According to some recent decisions, this even included a person who is not in physical custody but who is under immediate threat of being deported. The person who has been served with a notice to report for deportation can also challenge the surrender through habeas corpus. The statute directs that the proceeding shall be disposed of summarily as law and justice require. That gives wide leeway to the court. In disposing of the case, the court, of course, considers what has been done administratively and then makes the decision to release the person, to dismiss the writ, or perhaps, to remand the case.

DISTRICT COURT PROCEEDING FOR DECLARATORY REVIEW AND INJUNCTION

Here we have a proceeding which follows the normal course of civil litigation in the Federal Court. It starts with a complaint, answered by the government. Then there is a hearing by the court according to the procedure of the court and usually a disposition on the basis of a motion of summary judgment. Remember that the bringing of the proceedings to the District Court does not stay deportation. To assure a stay, you have to ask the Immigration Service. If they will not grant a stay, then you must ask the Court for one. That is done in the Federal Courts, through the process known as a Temporary Restraining Order.

SCOPE OF JUDICIAL REVIEW

The review of deportation cases through the courts developed as an aspect of the Fifth Amendment through due process of law. The criteria used by the courts also developed out of the Fifth Amendment requirement for due process. The major areas in which the court's review developed may be classified, to my mind, in several broad generalities. The first of these are errors in law. If you challenge an administrative interpretation, or any other legal determination, you have a basis for action by the court. Action without a statute or a misinterpretation of statute would deny due process of law. The second obvious aspect of judicial intervention is on a plea that the procedure has not been fair. This obviously relates to due process of law. Fair procedure is a concept which is in constant development. As such, you cannot say that the fair procedure of twenty years ago is the fair procedure that the courts would recognize today. What the advocate must do in presenting his case to the court, is to persuade the court, by appealing to its conscience in seeking a determination, that the administrative official did not act fairly. Finally, in relation to the deportation order itself, the third major aspect of seeking judicial intervention is a contention that the

administrative decision was not supported by substantial evidence. The language of the statute is that a deportation order must be supported by clear, unequivocal, substantial evidence. The Supreme Court meant that the deportation officials had better be certain that they acted on very solid evidence. When the court reviews the case, it will see whether there is this solid evidence and determine whether it is substantial. The important point, however, is that you can urge the court to reverse and vacate the deportation order on a contention that the evidence on which the administrative authorities acted was not substantial.

Most of the immigration determination which go before the courts relate to the exercise, failure to exercise, or improper exercise of discretion. The exercise of discretion normally implies that we have an officer who must determine the suitable criteria for granting this discretion. Certain language in Supreme Court decisions indicates that in granting the discretion to the Attorney General Congress intended to grant him "unfettered discretion". That, however, is very deceptive. The fact is that there is no such thing as "unfettered discretion". There is however, such a thing as judicial review, and there is the attitude of the courts that they must be satisfied that the action of the administrative agency was fair, reasonable, legal and proper. You will find in the decisions, statements to the effect that Congress intended to grant this discretion to the Attorney General and not to the courts. Although that sounds good, it is important to remember that the courts can never be kept out of anything they want to get into and they will get into any one of these cases, no matter what the statute says. I also think you will find a remarkable resemblance between the courts' approach to discretion and their approach to the review of determinations of deportability. Thus, for example, if you allege an error of law in evaluating statutory eligibility, something that the courts are best qualified to determine, they will say they have the last word. Where you allege an error of law, however, and you persuade the court that there was an error of law, you have won your case, if you allege that there was unfairness in procedure, to the extent unfair procedure applies, and you can show evidence to support the allegations, again you have an aspect of judicial intervention which will persuade the court. Finally, although the courts say that the substantial evidence rule does not apply to the exercise of discretion, the rule they apply is that if you show an abuse of discretion or arbitrary and capricious action, the courts will intervene. Now semantically that is different from substantial evidence. The fact is, however, that to determine whether the action was arbitrary or whether the administrative authorities acted arbitrarily, the court must examine the evidence. If the court then finds the administrative authorities went far afield in evaluating or assessing the evidence, the court will find a way to determine that this was indeed, arbitrary, capricious, and an abuse of discretion. So you see, the opportunity for review in discretionary actions

is there, is constantly exercised, and is very often successful.

At one time litigants claimed that the immigration authorities lacked authority to pass on claims to American citizenship. This contention was rejected by the Supreme Court which held that such determinations of entry applicants could be reviewed as any other determination of the immigration authority. That is to see if they acted illegally, unfairly or arbitrarily. However, when it came to the people in the United States, the Supreme Court would not go that far. In *Ng Fung Ho v. White*, the Court said, "Don't pay attention to what we said in the exclusion case. This is different, since we are dealing with persons in the United States, to whom the Constitution fully applies and requires a normal judicial hearing on the citizenship claim". There is a statutory provision which states that if your claim was presented in an exclusion proceeding, you cannot get a declaratory judgment by the court. But, again, do not pay attention to this. No one can stop the court. If they want to decide citizenship claims of people of the United States, they will. And, in the case of *Rusk v. Cort*, the court held that regardless of what the statute said, if you, a citizen claimant want to bring a declaratory judgment proceeding to establish your claim, you can.

JUDICIAL REVIEW OF OTHER IMMIGRATION DETERMINATIONS

Many of these determinations are constantly being reviewed in the court, outside of the deportation process. However, one determination that cannot be reviewed is the denial of a visa. This is really a remarkable provision in the statute because no other government officer is exempt from a judicial review except a Consul. There have been repeated efforts to modify and destroy the concept. I feel that one day this principle will weaken and the courts will knock it over. So far none has succeeded in establishing a right of judicial review of a Consul's denial of visa. Many other determinations can be reviewed and are presently being reviewed.

CONCLUSION

Although a practicing lawyer normally does not have much opportunity to get into court, the fact is that judicial review is, in many cases, the best refuge and is really a substantial hope for challenging oppressive or unjust administrative action. In most instances, the practicing lawyer will get what he wants from the administrative body. Largely, I think, you will find that when you go to the Immigration Service with your application, it will be granted; and when you want certain types of relief at a deportation proceeding, it will also be granted.

Here resourcefulness can be the greatest help to your clients in devising new approaches and new attacks. Through persistence in representing the client, the lawyer can win for his client additional time, the possibility of changing the result, and, in general, the assurance that the client is getting what he is entitled to under the law.

The lawyer who serves his client by taking advantage of these opportunities for review, is performing in the highest traditions of the legal profession.

**Current Issues and
Perspectives in
Immigration Policy**

Part 2

Opening Remarks

LEONARD F. WALENTYNOWICZ*

AS an administrator I indicated that the growing movement of people is one of the critical issues facing the world as well as the U.S. This movement results from a number of factors such as the basic human right of a person to live where he can best express himself, economic opportunity, the needs of employers, family and the like. These factors translate themselves into a number of developments; continuous in most instances and sometimes unique.

For example, we have the continuous flow of family members, professionals and skilled workers, and upon occasion we admit large numbers of specific groups as in the case of refugees from Southeast Asia, Russia, the Middle East, South America and in some years earlier from Europe and Cuba. In addition, we have, through lack of sufficient attention, allowed a large number of individuals to gain admission and remain in America in disregard of our laws.

It is not the purpose of my remarks to attack or criticize any of these developments. It is my purpose, however, to outline the parameters of the larger concerns that must be considered if we are to have a uniform and credible immigration policy that can be administered with your confidence and the confidence of those affected.

Initially, I should like to compliment this administration for the initiative it has taken in recognizing that a full study of our immigration policy is in order. Although studies in Washington are "a dime a dozen" they can contribute significantly if consciously and professionally executed. The objective evidence is there to indicate the need for this study. Nevertheless, I prefer the approach of the House Judiciary Subcommittee on Immigration, which provides for the study to be conducted by a representative commission rather than by one within the bureaucracy, as the Administration proposes. The prime reason is obvious. The broader group will have more links with the people of America and thus more accurately reflect their sensitivities.

*Former Administrator of Consumer Affairs, Department of State Visa Office.

Secondly, we must create a much better data base. It is not enough simply to collect data as to where people come from, we must also know their impact upon America. Such data can be collected with the necessary care for privacy so that individuals will have no fear they will be abused if they give such data.

We should have enough confidence in ourselves and in our ability to collect and use data fairly, with the utmost concern for civil rights, so we can avoid being intimidated by every cry of potential discrimination.

Third, we must decide what really is our capacity to absorb people into our country. Perhaps our annual intake could be one million if we solved the problem of labor and job mobility. One of the greater contradictions in our present policy is the existence of high unemployment while we are permitting large numbers of workers to come to and remain in the U.S. either properly documented or otherwise. Recently, some commentators have suggested that jobs ought to be brought to where the workers are instead of the other way around.

Fourth, we must consider what is, and then should be, the impact of our "affirmative action" programs on immigration policy. These affirmative action programs as they are now being conceived and implemented in effect stress group rights over individual rights and initiative. It is important that prohibited discrimination be eliminated without sacrificing other important American values.

Fifth, our immigration policy must have a much higher priority in the conduct of our foreign policy. In connection with our efforts to help the thousands of refugees from Southeast Asia we have met considerable resistance from most countries to receive them as immigrants. Interestingly enough, while many of these countries are signatories to international treaties and covenants that recognize a person's right to emigrate, there are no such treaties and covenants that address a nation's responsibility and obligation to receive immigrants. In a world with a rapidly increasing population, slower technological progress, and increasingly limited resources, the movement of people will become increasingly chaotic unless we bring it order. If we do not want to impose a curtain around our borders, we must do more to work with other countries, and this means more than rhetoric and commissions that meet once or twice to create a facade of action.

Sixth, the result of our policies must be more equitable. While part of our present basic approach is to ensure equality of opportunity, this gospel has been diluted if not contradicted in practice. One example is the use of parole authority. No uniform criteria have been developed as to the use of such authority by the Attorney General, especially as it may be used to admit large numbers of people. It is gratifying to see that the House Subcommittee has addressed itself to this question. In one sense the present legislation dealing with undocumented aliens is in reality an application for parole on a

mass scale. What were the reasons for admitting in the past, large groups such as the Cubans, Indochinese, Chileans, Russians, etc., and how do such reasons differ, if they do, with the reasons for the present call to admit more refugees from Indochina?

I do not know all the answers and solutions. I do not think anyone does, but we must work at the problems and engage in the hard dialogue, not offensively but constructively. Given, that America cannot accommodate all that wish to come here, it is important that those who are allowed to enter and remain are selected on a uniform and fair basis, taking into account our traditional values, such as, reunification of families, individual economic initiative, charity to refugees and the distressed as well as our national needs. It is within this context our discussions should occur, so that legitimate and responsible consideration of these matters is not overshadowed and paralyzed by too much emotion.

Current Issues In Immigration Policy

ANNIE M. GUTIERREZ*

I was asked here today, to comment on some of the immigration policy issues we are currently working on within the Administration. Briefly, I intend to speak about the border reorganization and refugee policy and I hope to go into some detail on President Carter's undocumented alien proposal.

There is currently underway, a border reorganization study which is part of the President's Reorganization Project. An Office of Management and Budget (OMB) team has been studying the border and the agencies which operate there for several months. Their goal is to propose a reorganization plan which will eliminate the duplication and overlap which exists between the many agencies on the border. Several options which the reorganization project might consider include: 1) the creation of a single all-purpose border agency that would do everything from agricultural inspection to patrolling the border between ports of entry in search of undocumented aliens; 2) the consolidation of the Immigration and Naturalization Service and Customs into one department, either in Treasury or in Justice; and 3) separate the enforcement function from the administrative function of the INS by combining the Border Patrol with the Customs Patrol in the Treasury Department; giving Customs all enforcement responsibilities for patrol and inspection at the border; and 4) transferring the Visa Office from the State Department to the INS. The Immigration Service would thus be an administrative and adjudicative agency, and Treasury would be the enforcement agency.¹

This is a rough indication of the current thinking on border reorganization and some outside groups have been consulted. We are always interested, however, in the ideas and opinions of those who have practical experience, and I would welcome your thoughts and suggestions.

*Associate Director, Domestic Affairs Office, White House.

¹ President Carter has sent these recommendations back to the Office of Management and Budget for restudy. It is not anticipated that a proposal on this issue will be sent to Congress in Fall, 1978.

Another important immigration issue which we have been working on is the U.S. refugee policy. Members of the National Security Council, State and Justice Departments and I have been meeting for several months in an attempt to outline a comprehensive approach. We are hoping to regularize the procedures by statute in order to avoid the piecemeal use of parole power, which always seems to occur under emergency circumstances. We will testify before the Eilberg Subcommittee in the future and will make proposals for new procedures which will still be in keeping with our commitment to human rights around the world.

The final immigration issue which I wish to address, at some length, is the President's policy on undocumented aliens. During the campaign, President Carter was asked many questions about undocumented aliens which piqued his interest in the issue. In addition, an employer sanctions bill in the Georgia Legislature resulted in much public discussion and press coverage. Secretary Marshall, coming from Texas, had some first hand knowledge of the subject. He had conducted related research on the Texas citrus industry and was personally interested in the whole question of undocumented aliens. In his first meeting with the Cabinet before they were formally sworn in, President Carter requested that the Attorney General, the Secretaries of State, HEW, and Labor develop a comprehensive proposal on undocumented aliens. The result is the bill which has been introduced in Congress.

The President was concerned chiefly with two aspects of the problem: the unlawful status of so many people and its consequences, which leads to their exploitation, not only by employers but by others in society. He was genuinely concerned about the large numbers of people living in fear, outside the protection of the law. The President was also concerned about job displacement. While this is not a crisis situation by any means, there is a growing awareness that over a period of time, with the increasing influx, the situation can only get worse. He wanted to devise a policy which, for the first time, would begin to address these problems in a comprehensive manner. His intent was to stabilize the present situation with as little disruption as possible and try to cut down the numbers of undocumented aliens that would come in the future. The availability of work, in the U.S., for those who wish to improve their circumstances creates the incentive for migration. An initial question was, therefore, "How do we keep people from coming here to seek work"? Some argued that illegal immigration would be discouraged by making it difficult for undocumented aliens to get jobs through an employers sanctions proposal. There was considerable concern over this option as many felt very strongly that any employer sanctions would have a discriminatory impact. Yet, the President opted in favor of an employer sanctions provision, so the next question became, "How does one fashion an employer sanctions proposal with a minimum of discrimination"? The decision was made to impose civil sanctions — injunctions and possible fines of

\$1,000 per alien — rather than a criminal penalty. Employers would be more willing to chance the hiring of persons who appeared foreign if they did not risk jail and criminal punishment. Secondly, the law would be enforced on a "pattern or practice" basis. In this way, the law would be enforced only against the most egregious violators — repeaters who have a pattern of hiring undocumented aliens.

An important element of the employer sanctions proposal is identification. How does the employer know whether a job applicant is documented? The proposal calls for the Attorney General to publish a list of acceptable identification documents such as driver's licenses in states where birth certificates are required to obtain them; birth/baptismal certificates; passports; immigration documents; and documents to be issued for those registering for temporary resident status. An employer should not be allowed to ask to see more than one document and he could not investigate beyond that document. Once the employer sees any document that is on the Attorney General's list prior to employment, he would have a defense if the document later proved to be fraudulent.

One option which was considered was the establishment of a uniform work permit, or identification document. It was argued by some Hispanics that this would minimize the discrimination against persons who look foreign because everyone would have to produce the same I.D. card regardless of appearance. This option was rejected on the basis of strong civil libertarian objections and the high cost.

The proposed legislation would also impose criminal penalties against employers and others receiving compensation for knowingly assisting an undocumented alien to obtain or retain a job. This was designed to stop the practice of some foremen and shop stewards who take payment from undocumented aliens out of every paycheck in exchange for not reporting them. I know some factories in California where the amount extorted is \$50 out of every paycheck. Our current laws on smuggling really do not easily cover such a person who is not involved in aiding the initial entry, but begins to exploit the alien at a later date.

A second measure designed to keep down the flow of illegal migration is the strengthening of resources at the border. This includes adopting more modern record-keeping systems as well as increasing the number of personnel. Most of you know that the INS has always used handwritten files. We want to mechanize the procedures and give them equipment necessary to do their record-keeping in a more efficient fashion. We want to help them expedite the cases they have pending. This process has already begun and we have made substantial inroads in cutting down the backlog.

Another major consideration in the formulation of the policy was: "How do we deal with the undocumented aliens who are already here"? One option was to propose a blanket adjustment of status for anyone present in

the country the day that the bill was introduced. Variations included the granting of permanent resident status to those who had been here three years or five years. These two solutions, however, would leave us with a large number of people who would still be outside the law. Studies show that the largest number of undocumented aliens travel back and forth between Mexico and the U.S., maintaining homes and families there, with an average stay of six months. The President did not want to force these people into permanent resident status. In addition, permanent resident status entitles an alien to petition for his immediate family. Since we do not know how many are here to begin with, we have no idea what influx this would create. Furthermore, almost 80 percent of the American public opposes any adjustment of status for people they view as law breakers, as responsible for unemployment and a variety of other social ills — albeit wrongly so.

The President finally decided to opt for the controversial provision which offers a two-tiered adjustment of status. People who were here before 1970 would apply for permanent resident status and those that came after 1970, but before January 1, 1977, would apply for a Temporary Resident Status which would allow them to stay for five years. Within those five years we would review their status in the light of more precise information about their number, location, family size, and economic situation. As a practical matter, most temporary resident aliens will, for a variety of reasons, no longer be in that status five years hence. Many will marry. Others will qualify for preference categories. Some may simply leave the United States. I personally don't feel that the numbers are so high as some of the scare figures that have been bandied around. I cannot believe that any of these people will be deported at the end of five years. Still, I cannot guarantee that. I am aware that this status has been compared to "limbo" and referred to as "second class citizenship". Many are critical that the proposal denies the temporary resident alien welfare or medicaid. The fact is that undocumented aliens do pay taxes and do not go on welfare. The welfare argument was seen as a "red herring" which would be used against the plan. It was decided to remove the argument altogether by denying the welfare.

As an immigration lawyer, I know it is going to be hard to advise anyone in this situation to register. A person who is already afraid of the government will have a very hard time coming to terms with registering and then waiting five years for possible deportation. However, deportation at that time would run directly contrary to the spirit of the President's program.

A third element in the program is cooperation with the governments which are major sources of undocumented aliens in an effort to improve their economies and their employment opportunities. We have already initiated talks with Mexico and have had several preliminary discussions on economic development and labor intensive projects. In addition, Senator Gonzalez has proposed legislation which would set up an inter-development bank

between Mexico and the United States. The solution inevitably has to rest in sufficient jobs at home. Given job opportunities, most aliens would rather stay in the comfort of their homes with their families, where their culture is appreciated and where they do not suffer discrimination and hardship.

The proposal also contains a statement that there will be no "bracero" program. It calls for the Security of Labor to conduct a review of the H-2 certification program. The object is to structure the program so that it responds to the legitimate needs of employers for a needed work force, and of American workers for protection of domestic employment opportunities. The aim is to improve the functioning of the H-2 certification program, but not to expand it.

The President is also establishing a Task Force to study the Immigration and Nationality Act. The chairman of this Task Force should soon be named.² I view the revision of the Immigration Act as one of the most significant parts of the policy.

Hearings on the legislation will be held in the Senate before the entire Judiciary Committee this session. The House will take it up when the House Judiciary Committee is convinced that the Senate is moving toward passage of a bill.

I sense that there is a mood in the country which will result in legislation. My only hope is that it will not be repressive or discriminatory in its impact. I personally detect, throughout the entire country, a new feeling of hostility against aliens specifically, and minorities generally. I see it in the mail we receive and in the questions which are asked when I speak before local groups. I sense a more intense racism in the debate on bilingual education, in the discussion of "reverse discrimination", in the increasing number of police abuse cases against Hispanics, and in the antics of the KKK on the border. This leads me to the conclusion that great care must be taken in the passage of this legislation. I know many sensitive and concerned people who advocate a position of total opposition to this legislation. I believe that circumstances make such a position politically unrealistic. If so, it behooves us all to work together to either come up with something better, or to concentrate on how we can make this proposal work. The Administration is committed to the passage of legislation which deals with the problem in a fair and humane manner. This is a challenging task and we welcome your help.

² David Yeres was appointed chairman of the Interagency Task Force on Immigration.

President Carter's Amnesty Proposals for Undocumented Aliens

DAVID CROSSLAND*

BECAUSE of the lack of hard data, some people would dispute whether the migration of undocumented aliens to the United States is a problem. The best evidence the Immigration Service can present is that our apprehensions last year rose to more than one million. That is ten times the number of apprehensions made in the middle 1960s, with about the same level of personnel. Even conceding that many of these may be repeaters, it is a significant enough increase to indicate that the number of people entering the country unlawfully is growing each year.

Last August the President announced a five point program to improve control of our borders, and meet the problem of those who are residing and working in the United States without documents. The major points in this package are: 1) Make unlawful the hiring of undocumented aliens; 2) Increase significantly the enforcement of the Fair Labor Standards Act and the Federal Farm Labor Contractor Registration Act, with both targeted to areas where many undocumented aliens are employed; 3) Adjust to legal permanent residence status, those undocumented aliens who have resided in the United States continuously since January 1, 1970, and who register with the Immigration and Naturalization Service. At the same time the creation of a new temporary resident alien status is proposed for those who have resided continuously in this country since prior to January 1, 1977; 4) Increase substantially the resources to control the border and other entry points to reduce illegal immigrations; and 5) Promote continued cooperation with the governments of those countries which are the sources of most undocumented aliens to improve their economies and their controls over alien smuggling rings.

It is generally accepted that the reason aliens enter the United States unlawfully is to obtain work which may not be available in their own country. Or, if the jobs are available, the pay is only a fraction of what can be earned in even a low paying job in the United States.

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The President proposed a deterrent to undocumented aliens obtaining jobs by making it unlawful to hire them. Enforcement will be sought against those employers who engage in a pattern or practice of hiring undocumented aliens. We in the Justice Department will set the priorities for enforcement.

Penalties for violation are proposed as civil fines up to \$1,000 per alien. In addition, the Government can seek an injunction against an employer. The violator then would be subject to a criminal contempt citation and possible imprisonment.

The employer may protect himself from blame by showing that he examined identification shown by the employee which proved his legal residence. We will make regulations designating which are acceptable identification documents.

One of these proposed is the Social Security Card, which will be issued only to legal residents.

The card will be improved to make it more difficult to counterfeit. However, there are no plans to make the Social Security Card, or any other document a national identifier.

To restrict job opportunities further, criminal sanctions have been proposed for persons who receive compensation for knowingly assisting an undocumented alien to obtain or retain employment or contract with others for their employment. This is directed at those persons who act as brokers to obtain jobs for undocumented aliens, or who act as agents for alien smugglers.

The proposals directed against hiring undocumented aliens requires legislation. This legislation has been introduced in the House, under the sponsorship of Congressman Rodino, Chairman of the Judiciary Committee, and in the Senate, sponsored by Senator Eastland and Senator Kennedy. Eastland is Chairman of the Senate Judiciary Committee and of the Subcommittee which oversees immigration matters.

While awaiting congressional action the President has directed that action be taken immediately to provide strict enforcement of the Fair Labor Standards Act, which requires payment of the minimum wage and provides other employee protections. He has also directed that criminal and civil penalties be sought more frequently by the Government for violations of this law. One of the incentives for hiring undocumented aliens is that employers can obtain their services for less than the minimum wage, and without complaint.

To enforce this law, 260 new inspectors are being hired and targeted in the areas of heavy undocumented alien employment. In addition, the Federal Farm Labor Contractor Registration Act, which prohibits recruiting and hiring of undocumented aliens for agricultural work, will be more tightly enforced. We will work closely with the Labor Department in both of these areas.

Many individuals and groups have expressed concern that sanctions against

employers for hiring undocumented aliens would result in job discrimination, a refusal to hire anyone who looked foreign. With the pattern or practice enforcement, this is less likely. However, the President has also charged the Federal civil rights agencies with making a greater effort to ensure that existing anti-discrimination laws are fully enforced.

Our Southern border is the most frequently crossed, both legally and illegally. While we wish to maintain the tradition of a friendly, open border with Mexico, increased security at the border is proposed. This will be done through reorganization of existing law enforcement organizations with border responsibility, and additional personnel and resources.

The exact nature of these increases will not be known until after the completing of the reorganization, but it is likely to be a minimum of 2,000 additional personnel.

In addition, the Immigration Service is also shifting some enforcement personnel to those areas having the highest rates of illegal entry. We added 100 people to the Chula Vista, California-Tijuana border area in June as a temporary detail. All of these have since been replaced by permanent personnel.

In addition, an anti-smuggling task force has been established to act against the smugglers who traffic in human life, and U.S. attorneys will be instructed to give higher priority to prosecuting persons caught smuggling aliens. Last year the INS, even with a limited program, caught 15,000 smugglers in the act of smuggling nearly 150,000 aliens.

The proposals I have discussed to date are largely short range solutions. An effective policy to control illegal immigration for the long term must include the development of strong economies in the countries where the aliens come from. While this cannot be achieved immediately, the United States is committed to helping those countries obtain assistance to strengthen their economies and provide jobs for their work force.

If these programs are implemented, the United States can begin to bring immigration within the controls that are in the law. However, this will have little impact upon those who are already living in the United States without immigration papers, who number perhaps in the millions. Most of these immigrants still live in fear of detection, and are subject to mistreatment and poor working and living conditions. They are truly the most vulnerable residents of our country. Afraid to go out at night or to complain of abuse, they remain exploited and abused.

The President has proposed changes in the law, which will legitimize these persons. A simple change is proposed to accommodate those who have been here for longer periods of time. There has been in the Immigration and Nationality Act since 1929, a provision called "registry" which allows persons of good moral character who have resided unlawfully in the country for several years, to be granted permanent residence. This is the first step to

citizenship.

That law currently applies to persons who have been here since 1948. It is proposed to move that date up to include all who have been here prior to January 1, 1970...over eight years ago.

To provide for those who have not been here that long, a new kind of status would be created called "temporary resident alien". This would apply to those who have been in the United States continuously since January 1, 1970.

This status would be granted for five years to those who registered with the INS within a one year period. During this temporary stay, we hope to learn more about the number, location and impact of undocumented aliens before making a final decision on their status.

One difficulty here is the obvious inequity of legalizing the status of those who entered illegally, while others wait abroad for years to enter legally.

Some have argued that this temporary resident status would create a new underclass of residents. However, these persons are already underclass. This proposal would enable them to live decently, to seek other jobs and to be assured of receiving at least the minimum wage and working conditions.

Anyone who entered after January 1, 1977, would continue to be subject to deportation.

That is essentially what was contained in the President's message last summer. There are a few actions which the Immigration Service has been taking since then.

Most of those aliens who have been in the country without documentation since before January 1, 1970, are being permitted to remain to await the enactment of the proposed legislation. These persons may already be eligible for suspension of deportation under current law. We expect more persons to use the administrative appeals available to them until the Congress finally decides. Of course, they must meet the requirements of the law in that they cannot be inadmissible as criminals, and they must be of good moral character. We do anticipate some problems with the requirements of documentation.

As a practical matter the number affected by this is not going to be large. Of more than one million apprehensions last year, only 127,000, about one eighth, had been here more than one year. Very few had been here more than seven years.

One thing is certainly clear about immigration. This is an issue of great emotional appeal. The various interest groups all have strong positions. The greater danger is not that the package is too tough or too soft. The approach can always be changed. The danger is that there will be fighting and bickering and no legislation will be passed — thereby consigning undocumented aliens to still more suffering and abuse. The legislation proposed is not perfect and will not solve the problem. It is, however, a good first step. It buys some time and it relieves the plight of the undocumented who are here.

The United States has been, and I am confident will continue to be, the most liberal country in the world for immigrants. We welcome 400,000 people annually, more than any other country in the world. We have long been the haven for many, and will continue to be in the future. We value our citizenship highly — especially when we consider bestowing it on others. We are concerned over the plight of the poor in the world.

Our present laws and regulations, however, are in need of updating. The President has already directed a comprehensive review of existing immigration laws and policies. I am hopeful and confident that this will be done to the benefit of not only the United States but to the hundreds of thousands of persons throughout the world who would seek their haven here — and to the millions already here, documented and undocumented — who want to know if our deeds will match our words.

Legal Critique of President Carter's Proposals On Undocumented Aliens

ANTHONY J. BEVILACQUA*

SIGNIFICANTLY, Congressman Peter Rodino chose October 12, 1977, the 485th anniversary of the discovery of America, to introduce into Congress a bill on undocumented aliens. Known as H.R. 9531, this bill incorporated the major features of President Carter's proposals on this issue which he formally announced on August 4, 1977.

President Carter's program covered a larger area of proposed action on undocumented aliens than is embodied in H.R. 9531 (Identical Bill in Senate-S. 2252). This critique will limit itself to President Carter's recommended legislation as it was presented in these bills. Accordingly, it will deal with the two main concepts of adjustment of status and employer sanctions. The adjustment of status concerns itself with two classes: lawful permanent residents and temporary resident aliens. Employer sanctions covers a number of issues which I have considered under separate headings: 1) legal critique of employer sanctions with emphasis on the enforcement dimension; 2) employer and evidence of alien's eligibility to work, and 3) crime of assisting undocumented aliens in employment.

While this paper is largely a legal critique of President Carter's proposals, I wish to state beforehand that I feel that the President has manifested a great deal of courage and sensitivity in attempting to deal intelligently with this complex and controversial issue. While it is my opinion that there are objections to some of his proposals, I think he has shown his intention to be humane and understanding in seeking to assist the undocumented aliens who are in the United States.

Although I do not think he has been generous enough with his amnesty provisions, at least he was not afraid to speak of amnesty for some of the undocumented. This is an enlightened step.

In addition, President Carter has recognized as essential, an economic assistance program in source countries. He has also seen the immediate

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necessity for a study of immigration policy. These proposals along with two other proposals on border enforcement and temporary workers have not been incorporated into the bills.

The aim of this critique, therefore, is not to halt the momentum of the President's thrust towards a humane resolution of this problem involving so many human lives but rather a humble attempt to assist in the clarification and refinement of the program.

LAWFUL PERMANENT RESIDENTS

Proposed Legislation [Section 249 (a), (b) of the Immigration and Nationality Act as amended by Section 2 (a) of Bill]

Lawful permanent residence will be granted to undocumented aliens, with certain exceptions, provided: 1) They entered the United States prior to January 1, 1970; and 2) They have resided continuously in the United States since such entry. The adjustment of status for these long term residents would be effected by amending Section 249 of the Immigration and Nationality Act to update the registry date to January 1, 1970.

Observations on Registry Date

While I welcome this adjustment of status to permit a certain number of undocumented aliens to become lawful permanent residents, it is my opinion that it is far from being generous. The Immigration and Naturalization Service estimates it will benefit about 765,000. It is the opinion of others that the number will be much less, particularly since there is considerable overlap with Section 244.

It is my opinion that the registry date should be advanced to a date reasonably close to the effective date of the bill. It has been suggested that the registry provision be made available to all undocumented, with certain exceptions, who had been residing in the United States for at least a period of six months prior to the effective date of the bill, or that it be granted to those who entered prior to January 1 of the year in which the bill is passed. Excluded, however, in any amnesty provision would be criminals, procurers and other immoral persons, subversives, violators of narcotic laws and smugglers of aliens. These are also the immigrants excluded in the present bills.

By granting permanent residence to all undocumented aliens, with the exception of criminals, procurers, subversives, etc., it would not be necessary to have a temporary resident alien class. Granting complete amnesty, with the exceptions mentioned, may not be politically expedient at the present time, but for many reasons which would be outside the scope of this paper, it would appear to be the more humane and logical as well as the least costly

solution to part of the question of the undocumented aliens in the United States.

According to the section by section analysis of the bill, the provisions of Section 212 (e) of the Immigration and Nationality Act, 8 U.S.C. 1182 (e), would appear to preclude exchange visitors subject to the two-year foreign residency requirement from obtaining adjustment under Section 249.¹ There does not seem to be sufficient justification to eliminate this group and special provision should be made to include them.

Presuming that the January 1, 1970 registry date will be retained, there should be provision to grant concomitantly lawful permanent residence status to a qualifying alien's spouse, children and parents, even though the latter may have entered the United States after January 1, 1970.

Observations on Continuous Residence Requirement

It is anticipated that it will be difficult for many undocumented aliens to prove continuous residence. The usual documentary evidence will not be available since many received their salaries in cash and many have scrupulously avoided having their name on any documents that would be acceptable as testimony. The only hope for some will be if the regulations will be satisfied with affidavits of credible witnesses. Even affidavits may not be available for many since undocumented aliens tend to move frequently and also tend to remain an invisible group.

Since it will be difficult for many of the undocumented residing here before January 1, 1970, to prove continuous residence for the required period of at least seven years, it is suggested that the regulations spell out specifically what will constitute evidence of the continuous residence.

Such specific regulations will give greater certitude that the qualifying undocumented possess the required proof of residence and lessen the possibility and fear that unacceptable evidence will subject them to deportation.

TEMPORARY RESIDENT ALIENS

Proposed Legislation: Section 4

The proposed Alien Bill creates a new class of aliens to be known as temporary resident aliens. Section 4 permits, with certain exceptions, undocumented aliens to receive this temporary status provided: 1) they were residing in the United States on or before January 1, 1977, and 2) they have registered within one year of the effective date of the Act.

The major features of this new status can be summarized: 1) the temporary status will be granted at the discretion of the Attorney General for five years

¹ Congressional Record - Senate (daily ed) v. 123, Oct. 28, 1977: S. 18066.

from the effective date of the bill; 2) they would be allowed to work; 3) they could not send for their close relatives; 4) they would not be eligible for certain federal social benefits; 5) they would be permitted to make temporary departures from the U.S. during this period without violating their status; and 6) during this period, a final decision would be made regarding the future of their status.

Purpose

The expressed purpose of the temporary resident alien status is to make a count of the number of undocumented aliens here and to evaluate their impact on the economy. The White House section-by-section analysis of the "Alien Adjustment Act of 1977" explained that "the granting of temporary status is necessary to preserve a decision on the final status of a large group of undocumented aliens who have resided here for shorter periods of time, until more precise information about their number, location, family size and economic situation can be collected and reviewed".²

I am sure that this innovative proposal of a new class of temporary aliens was motivated by a generous and humane desire to give some relief to all those undocumented who have been living in constant fear of apprehension. My own desire is that the registry date be advanced from the proposed January 1, 1970 to a date reasonably close to the effective date of the bill. Presuming that such a generous amnesty provision will not be forthcoming in this Act, I shall deal with the reality of the proposed temporary resident alien Act provisions. Because of its novelty and nature, it is only natural to expect that it would occasion certain objections and questions.

Observations

The obvious and primary objection is the uncertainty about the eventual status that will be accorded the registrants under this measure.

It would be unrealistic for the Administration to expect that the majority of undocumented will register in that first year (the period permitted for registration), if the bill retains its present wording. Both Attorney General Bell and Commissioner of the Immigration and Nationality Service, Leonel Castillo, admitted upon questioning that it was possible after the five years that these aliens could be deported.

The Administration indicates that its hope is to give these persons permanent status but it cannot offer this at present and so it asks them to trust in the good intentions of the country.³ Unfortunately, asking for trust is not a

² The White House, September, 1977. P. 1.

³ Cf. Remarks of Attorney General Bell, August 4, 1977 press briefing on occasion of presentation of President Carter's proposals.

guarantee. However sincere may be the desire of this Administration to help all these undocumented to remain, one can realistically wonder about the situation five years from the date of the bill. What Administration will be in office five years after the bill? What will be the mood of the people at that time? Will there be high unemployment or a serious recession? Will there be a strong nativist and anti-alien attitude at that time?

A humane resolution of this objection would be to include in the bill an assurance of permanent resident status after the five years. This assurance will guarantee a substantial if not almost complete registration and thus provide the Administration with the information desired.

If the offer of permanent status is not explicitly stated, it might be that hope for success in achieving substantial registration of the undocumented will depend on voluntary groups that work with the undocumented and leaders of the alien communities. The undocumented, to a large extent, will look to these groups and leaders for guidance as to whether or not they should register. The Administration would do well to consult with them even before passage of the bill.

I will admit that there are a few spokesmen for the undocumented aliens who have told me that, while not satisfied with this temporary resident alien status, they will urge their people to register. Their feeling is that it will at least give a five year respite and sense of legitimacy to the people who have been living in constant fear. If at the end of the five year period, it appears that permanent status will not be granted and that deportation is contemplated, they are certain that the people will have sufficient time to go underground again - a procedure at which they are expert. There is also the possibility that by that time they may be able to qualify for permanent residence. It is also suspected that those aliens who do not register will become an institutionalized sub-class with all the disadvantages and ills that are entailed.

There seems to be insufficient reason why this status is denied to out-of-status alien students and exchange visitors with a two-year foreign residence requirement. It is, therefore, urged that this status be extended to student aliens and exchange visitors with a two-year foreign residence requirement by eliminating Section 4 (b) (2) and 4 (b) (3).

Section 4 (f) provides for a rescission of this status if later it is found the alien was not eligible. The proposal does not contain any provisions for a minimal process before rescission. This rescission should be allowed only after proper notice and an opportunity for a hearing has been afforded the alien.

In addition, because of this possibility of a rescission without any hearing, those undocumented who would want to register will very likely want to determine beforehand whether they fulfill all the conditions of eligibility. This could prove a great burden on the various social agencies which they

will approach for assistance and guidance.

The exclusion of the temporary resident aliens from certain social benefits is considered an injustice and should be eliminated from the proposal. During this period these aliens will be paying all the taxes as do citizens and in justice should have a right to the benefits for which their taxes pay.

In addition, excluding them from welfare benefits exposes them again to exploitation by their employer. Since the alien employee cannot receive any benefits and is totally dependent on employment, the employer can easily exploit these aliens by the threat of dismissal. The insecure status itself of the temporary resident alien exposes him to exploitation by the employer. The alien and the employer know that if permanent residence is going to be granted at the end of five years, the temporary alien will have to show at least that he was a person of good character and that he will not be a burden to the state. Essential to this certification of both of these requisites will be employment.

Furthermore, while the temporary resident alien will have the right to work, there is no assurance that this right will not be disregarded with impunity in view of the Supreme Court decision in *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1976). In this decision, the Supreme Court held that private employers could discriminate against aliens because of alienage and as long as such discrimination was based solely on alienage it was not actionable under Title VII of the Civil Rights Act of 1964. While the court holding would also apply to lawful permanent residents, its impact is more burdensome for temporary resident aliens. Since the temporary resident aliens cannot receive certain federal social benefits, unemployment presents for them a more ominous specter of hardship than it would for lawful permanent residents.

Prohibiting the temporary resident alien from sending for his family will create serious moral problems for many men here, and their wives at home. It will have a deleterious effect on the children, and disrupt family life. It will cause many of the wives and children to come here illegally. While theoretically, the men would be permitted to visit their families and return, the cost of traveling and job commitments would make such visits prohibitive especially for those from distant countries.

As of January 1, 1977, adjustment of status under Section 245 will be denied to an alien (other than an immediate relative) who continues in or accepts unauthorized employment prior to the application for adjustment of status. Most of those who would be applying for the temporary resident alien adjustment of status would have been working since January 1, 1977, and therefore, would be disqualified under the amended Section. Section 245 (c) of the Immigration and Nationality Act, 8 U.S.C. 1255 (c). To avoid this impediment to adjustment, the authorization of employment granted in 4 (c) of the proposed bill should be made retroactive to January 1, 1977.

Although temporary resident aliens may be permitted in the discretion of the Attorney General to be readmitted after temporary absences abroad, the proposal does not seem to allow the application of the Fleuti doctrine for brief visits [*Rosenberg v. Fleuti*, 374 U.S. 449 (1963)].

As recently as July 1977, a Federal District Court decision concluded that the Fleuti doctrine on brief visits abroad and entry was limited to lawful permanent residents (*Mischel v. District Director*, INS ___ F. Supp. ___ S.D.N.Y. 76 Civ. 1799, July 26, 1977). Since temporary resident aliens are not lawful permanent residents, a brief unauthorized visit to Mexico or Canada, for example, could result in their exclusion.

Since undocumented aliens residing here on or before January 1, 1977 would have one year to register, one could argue from the present wording of the law that every undocumented alien, whether he intends to register or not, would be free from deportation during that first year. In fact, it would seem a useless act to attempt during the first year allowed for registration, any arrest of an undocumented who would otherwise qualify for temporary resident alien status since the moment the undocumented is apprehended, he or she can register.

From the present wording of the law, it can also be asked if an undocumented worker in that first year can continue to work while deciding if he wishes to register? The problem here arises because of two provisions that seem to conflict. Section 4 (a) gives an undocumented alien residing here on or before January 1, 1977 a full year after the enactment of legislation to register. Section 4 (c) states that such a temporary resident alien will be given documentation of his status and Section 4 (d) states that the Attorney General will grant such an alien authorization to work. However, Section 274 (c) (5) equivalently requires an employer to have seen documentary evidence of an alien's right to work and in the case of one hired before the bill, that he do so within 90 days of the effective date of the Bill.

The problem, therefore, is how can the undocumented alien show any documentation within 90 days of the Act or even reasonably after, if he has a year to register and therefore, has not received any documentation?

EMPLOYER SANCTIONS

Proposed Legislation [Section 274 (c) (1), (2), (4) of the Immigration and Nationality Act as amended by Section 5 (a) of the bill].

Section 5 of the proposed bill imposes sanctions on employers of undocumented aliens. It does this by amending Section 274 of the Immigration and Nationality Act and prescribing the following: 1) that it shall be unlawful for an employer to employ aliens who are not lawful permanent residents or not authorized to work; 2) that an employer who violates this law "shall be subject to a civil

penalty of not more than \$1,000 for each such alien" in his employ on the effective date of the bill or employed afterwards; and 3) that upon determination that cause exists to believe that the employer has engaged in a "pattern or practice" of employing undocumented aliens, the Attorney General "shall bring actions for both civil penalty and injunctive relief". Accordingly, in this instance an employer could not only be fined but also be enjoined and jailed for contempt if he violates this injunction.

Observations

After several readings of the employer sanctions provisions, the one thing that is clear is that the section needs clarification. On the one hand the provisions make it unlawful for any employer to employ aliens not permitted to work and each violation of this prohibition subjects the employer to a civil penalty of \$1,000. On the other hand, a following subsection prescribes that in a "pattern or practice" of violations, the Attorney General shall bring action for both civil penalty and injunctive relief. The White House Fact Sheet went on to explain that enforcement would be limited to employers engaging in a pattern or practice of violations. It is presumed these two provisions are not contradictory. But how does one reconcile them? There are several possible interpretations. Does it mean that in a single violation, that is, where there is not yet a "pattern or practice", the employer will not have any action taken against him, but that in case of a "pattern or practice" the Attorney General shall, meaning *must* take action?

The Fact Sheet from the White House released on the occasion of President Carter's announcement of his proposals gives support to this interpretation, stating, "Enforcement would be limited to employers who engage in a "pattern or practice".⁴

At first glance, the section by section analysis of this provision seems to confirm the Fact Sheet interpretation that enforcement will be restricted only to a "pattern or practice". In fact, however, it does not. The analysis notes, "Therefore, those employers who may inadvertently hire an undocumented worker will not have to fear the imposition of sanctions under this bill..."⁵ The issue here, however, is not about an isolated inadvertent hiring but whether an isolated knowing hiring of an undocumented alien could lead to the imposition of a civil penalty.

It would seem rash for anyone to seek protection in the Fact Sheet assurance that enforcement would be limited to "pattern or practice" violations. The law should spell out clearly its meaning. A second possible interpretation raises the question whether in isolated instances the employer is merely

⁴ Office of the White House Press Secretary, "Undocumented Aliens Fact Sheet", August 4, 1977. P.1.

⁵ Congressional Record, October 28, 1977: S. 18066.

subject to a civil penalty? In other words, in a case where the employer knowingly hires a single undocumented alien, the Attorney General would have the discretion to bring or not bring action against the employer while in a "pattern or practice" situation, the Attorney General would have no such discretion, but would be obliged to bring action. Notice the difference in wording. In the first provision it states that an employer who violates the law shall be subject to a civil penalty while in the subsequent "pattern or practice" provision, it states that the Attorney General shall bring action.

The comment in the section-by-section analysis of the bill does not tend to support this literal interpretation. Its observation on the first provision reads: "Section 274 (c) (2) provides that in the event of a violation of the foregoing prohibition, a civil penalty not to exceed \$1,000 shall be imposed upon the employer..."⁶ Note the omission of the phrase, subject to, and the use of the obligatory term shall. A third possible interpretation of employers sanctions could mean that in case of an isolated violation, only a civil penalty action would be brought against the employer but not an injunction while in a "pattern or practice" situation and the Attorney General would bring action for both a civil penalty and injunctive relief. Note again the difference in wording. In the first provision it reads that the violating employer "shall be subject to a civil penalty of not more than \$1,000", while in the "pattern or practice" provisions it reads, "the Attorney General shall bring actions for both civil penalty and injunctive relief..." The section-by-section analysis seems to confirm that in the "pattern or practice" violations, the Attorney General is obliged to bring action for both a civil penalty and an injunction. It explains that in a "pattern or practice" violation, "the Attorney General shall bring an action for civil penalty along with an action for injunctive relief..."⁷

A fourth possible interpretation poses the question whether the first provision means that no action will or even can be taken against the employer if he has employed only a single undocumented alien, but that the employer becomes subject to a civil penalty if he employs more than one, even though it is not yet a "pattern or practice". There is an old axiom of law: "*Ubi lex non distinguit, nec nos distinguere debemus*". Where the law does not distinguish, we should not distinguish. It is another way of saying that we should primarily interpret the law the way it is written. Section 274 (2) makes the employer subject to a civil penalty of \$1,000 when he violates Section 274 (c) (1) — that is, when he employs aliens not permitted to work. Section 274 (c) (1), reads: "It shall be unlawful for any employer to employ aliens..." Note the word "aliens" is in the plural, not in the singular.

The problem and confusion in interpreting employer sanctions arises basically from Section 274 (c) (4) which uses the concept of "pattern or

⁶ *Ibid.* ⁷ *Ibid.*

practice". If this provision had not been inserted, it would be fairly clear that an employer could be fined up to \$1,000 for any hiring of an undocumented alien. As a result of this "pattern or practice" insertion, the Fact Sheet comment on it and observations by several writers, it is not at all clear whether enforcement will be completely restricted only to "pattern or practice" violations and that there will be no enforcement at all where there is no "pattern or practice".

Another way of highlighting the problem about enforcement is to ask this question: In the event of an action brought against the employer, would the employer be entitled to the defense that he has not engaged in a "pattern or practice" of employing aliens in violation of the prohibition?

If enforcement is absolutely limited to "pattern or practice" violations, we have the unique situation with the violations that are not a "practice or pattern", wherein we have a prohibition without a de facto penalty. If I remember my philosophy of law, it is generally held that a law that is not enforceable is not really a law.

Clarification is also needed of the concept of "pattern or practice". The section by section analysis attempts an elucidation by reminding us that the term has been used in other federal statutes, such as the Civil Rights Act of 1964 (24 U.S.C. 2000 e-6) and the Fair Housing Act of 1968 (42 U.S.C. 3613). Furthermore, the analysis continues, the Government will be required to show more than just accidental, isolated, or sporadic hirings of undocumented workers in order to establish a "pattern or practice" (See, e.g. *International Brotherhood of Teamsters v. United States* — U.S. —, May 31, 1977).⁸

Some have utilized this comment as evidence that there will be no enforcement in "accidental, isolated or sporadic hirings". That would not seem to be a legitimate conclusion. The sentence only tries to describe what would not be a "pattern or practice", but of itself does not exclude the possibility of enforcement in "accidental, isolated or sporadic hirings". What the comment does not give is any meaning to "pattern or practice". Thus, it can be asked whether the following hypotheticals would be a "pattern or practice":

- a. A housewife who always hires an undocumented alien as a domestic, although she has to do this only every 2-3 years; or
- b. An employer who, after the law becomes effective, hires only once, a large number of undocumented workers.

After reading the comment in the section-by-section analysis, an employer or a housewife might feel assured that even several isolated or sporadic hirings would not trigger action on the part of the Attorney General. This security, however, is chilled by the sentence that immediately follows in the section by section analysis: "Therefore, those employers who may inadvertently

⁸ *Ibid.*

hire an undocumented worker will not have to fear the imposition of sanctions under this bill..." The question, however, is whether there is a lot to fear where the employer inadvertently hires more than one undocumented worker or, as has been indicated before, where the hiring of one undocumented worker was not inadvertent.⁹

Although not stated in the bill, the section by section analysis explains that retention of undocumented aliens hired prior to the effective date of the Act will be considered in establishing whether a "pattern or practice" exists afterwards.¹⁰ It would seem, therefore, that the hiring practices of an employer prior to the bill can serve as a basis to reaching a conclusion of "pattern or practice", even though the incident after the date of the bill would not of itself be considered a "pattern or practice". I have difficulties with this. Since an action in a "pattern or practice" action can lead to criminal penalties, are we not approaching a situation analogous to an "ex post facto" law? It is true that the employer is not being penalized criminally for an act committed prior to the law. However, he is being punished with a criminal penalty for a "pattern or practice" violation whose essential ingredients are acts committed prior to the law when they were not unlawful.

As far as I can determine, practically all employer sanctions bills proposed in Congress and in State legislatures required that the employer knowingly employ undocumented aliens before penalties could be inflicted. Section 274 (c) (1) of the present proposed Act fails to include this qualification. It reads, "It shall be unlawful for any employer to employ aliens..." Under the present wording of the bill, it would seem that an employer would be subject to the civil penalty even though he had no knowledge that the person employed was an undocumented alien. The section-by-section analysis does try to assure employers that they have nothing to fear if they "inadvertently hire an undocumented worker..." However, this phrase is a comment on the notion of "pattern or practice" rather than on the knowledge of the status of the employee.

Section 274 (c) (5) attempts to alleviate the anxieties of employers by declaring that proof that he saw documentary evidence of the applicant's eligibility to work would give rise to a rebuttable presumption that the employer had not committed any violation. However, the fear of employers is not going to be removed by such language. Unless it is clearly spelled out by including the word, knowingly, as a qualification of employing, many employers will take no chances. Thus, this increases the possibilities of discrimination against persons classified as foreign in looks, language and behavior. It must also be remembered that even when the employer proves he saw documentary evidence of the alien's lawful right to work, this proof is not an absolute defense but only a rebuttable presumption. This proof, in

⁹ *Ibid.* ¹⁰ *Ibid.*

other words, does not remove the fear on the part of the employer.

A further problem with the enforcement dimension of employer sanctions concerns the length of time during which an employer is vulnerable to civil and injunctive action for violations. Section 274 (c) (2) coupled with Section 274 (c) (4) makes the employer liable for penalties for each such alien in the employ of the employer on the effective date of the Act or who thereafter has been employed by him.

The law seems to be enforceable once he has hired or continued to employ undocumented workers even though at the time of the action being brought against him he no longer had any undocumented working for him and had terminated the practice of such employment. A variation of this problem would occur, for example, on the occasion of action brought against an employer for undocumented workers actually in his employ. In that action is the employer subject also to fines for undocumented workers previously employed unlawfully but no longer in his employ at the time of the arrest of the undocumented aliens in the current action?

Neither Section 274 (c) (4) on the "pattern or practice" concept nor the section by section analysis indicate any time limit. On the contrary, both support the view that once an employer has violated the law he remains liable to action by the Attorney General. Section 274 (c) (4) reads: "Upon determination that cause exists to believe that an employer has engaged in a "pattern or practice" of employing aliens in violation of this subjection, the Attorney General shall bring actions..." The section-by-section analysis used practically the identical language. In other words, there is no Statute of Limitations in the proposal. Perhaps, there is a general Statute of Limitations elsewhere. However, if the Government is going to make every effort to eliminate causes or even possibilities of discrimination in hiring practices, it would be advisable to remove all doubts and fears on the part of the employer by incorporating in the Act a reasonable Statute of Limitations.

Section 274 (c) (1) does not include the provision of previous legislative proposals to permit employment of non-immigrants lawfully admitted for the express purpose of engaging in specific employment, e.g., H (temporary workers), I (media employees), L (intracompany transferees). Section 274 (c) (1) should have added to it a phrase permitting employment of non-immigrants authorized to work by their very status. Without such wording, employers of non-immigrants otherwise authorized to work would be subject to sanctions unless they obtained specific authorization of the Attorney General.

PROOF OF ELIGIBILITY TO WORK

Proposed Legislation [Section 274 (c) (5) of the Immigration and Nationality Act as amended by Section 5 (a) of the bill].

1) A rebuttable presumption of innocence will arise for an employer if he can prove that he saw documentary evidence of a person's eligibility to work; 2) he must examine this evidence prior to employment; and 3) in case of those hired before the effective date of the bill, he must examine the evidence within ninety days of the effective date of the bill.

Observations

The White House Fact Sheet on the Alien Bill pointed out that "the employer would not be required...to keep records of the documents seen".¹¹ This seems a strange comment in the light of the demand of Section 274 (c) (5) that the employer prove that he saw documentary evidence of eligibility. The Attorney General plans to issue a list of identification documents that will be evidence of legal status but what is omitted is direction on what constitutes proof that the employer saw the identification document. If he is not required to retain records of the documents seen, will his statement that he saw the documents be sufficient? It would seem that what is invited here is widespread prevarication.

In simple language, what will prevent employers bent on exploitation from not requiring documents and lying that they had seen them if there is no requirement to retain records of the documents seen. If an employer wants to have certain proof, he will probably keep records of the identification documents. This, however, will entail a considerable increase in expenses for the employers. It is this objectionable feature of increased costs for the employers that the Administration seems to want to counteract by not requiring retention of records.

The White House Fact Sheet also assured the employer that he "would not be required to verify the authenticity of the identification document".¹² Very likely, this also appears to be a verbal assurance to employers that the legislation will not demand significant expenditure of time and money to comply with the law. At the same time, it does not give the assurance that the employer will not be subject to penalties if it is determined that the documents were not authentic. The employer is granted only a rebuttable presumption. Furthermore, the release from both the necessity of keeping the records, and the necessity of verifying their authenticity, would seem to encourage the forgery of documents.

The bill does not require the employer to seek documentary evidence from all applicants for a job or from all employees working for him from before the enactment of the law. It leaves the employer complete discretion as to which persons must show his documentary proof of eligibility to work. Since the employer will be more likely to request evidence only from those with foreign appearance or characteristics, there is present, another form of

¹¹ "Undocumented Aliens Fact Sheet". P. 1. ¹² *Ibid.*

discrimination.

It would seem that to avoid this form of discrimination, the bill would require the employer to examine a document of legal status from all applicants or employees. However, if such be the case, how would this differ from utilization of the Social Security card alone as proof of eligibility to work? Is there any difference between requiring proof from a variety of documents and requiring proof from one sole document if the law demands proof from some acceptable document? In either case, the conclusion seems inevitable that all workers must have an identification document.

It can be argued that if an employer must prove he has seen a document of worker eligibility and if to avoid discrimination every worker should be required to present documentary evidence, what need is there for legislation imposing employer sanctions for employing undocumented aliens?

In fact, Congressmen Sisk of California and Murphy of Illinois have proposed such alternative legislation requiring all employees to present a Social Security card before obtaining employment and penalizing the employer for not having required this presentation of the Social Security Card.¹³ The Social Security number is today, used for income tax identification, for registration in schools and for so many other identification purposes. Its requirement for employment, therefore, would not be considered a radical change of policy or employment procedure.

If an employer provides proof of having seen an identification document of legal status, it affords him a rebuttable presumption that he has not violated the law. This provision in H.R. 9351 and S. 2252 is a significant change from the original legislation incorporating President Carter's proposal and known as the "Alien Employment Act of 1977". In the latter proposal, proof that the employer had seen documentary evidence of employment eligibility was to be "conclusive evidence" of innocence.

Since the proof of having seen the documents gives rise only to a rebuttable presumption, this equivalently exposes the employer to sanctions no matter how much good faith he had. It, therefore, compels the employer to make every attempt to verify the authenticity of the documents although the Administration assured him that this was not necessary. This requirement seems to make the employer the enforcement agent of the government with a "sword of Damocles" hanging over his head threatening sanctions. In such a situation, employers anxious to comply with the law but fearful of the additional burdens and possible sanctions, will have another reason to discriminate by not hiring anyone with foreign characteristics.

This unfortunate provision places the burden of providing non-violation of the statute on the employer. The proof, however, is only a rebuttable presumption of non-violation. It would seem that this provision may be

¹³ H.R. 9259 - September 22, 1977.

challenged constitutionally as a denial of due process and equal process of law.

It is suggested that discrimination and constitutional questions can be avoided by making proof of having seen identification documents conclusive evidence of innocence and, hence, an absolute defense. While this has its disadvantages, it is the lesser of two evils.

AID TO EMPLOYMENT OF UNDOCUMENTED ALIENS

Proposed Legislation [Section 274 (d) of the Immigration and Nationality Act as amended by Section 5 (a) (2) of the bill].

THIS proposal would make it a felony knowingly and for gain to assist an undocumented alien in obtaining or retaining employment, or to enter an arrangement to facilitate his employment. The penalty is a maximum of \$2,000 fine and/or up to five years of imprisonment for each alien involved.

Purpose of Legislation

The section by section analysis of the bill¹⁴ and the White House Fact Sheet of August 4, 1977¹⁵ emphasized that the proposed legislation was aimed at: 1) Persons who knowingly "broker" jobs for undocumented aliens; 2) Agents for alien smugglers; and 3) Persons in supervisory positions who sometimes threaten to report undocumented aliens unless given a fee from every pay check.

Observations

There would be few who would not support this proposed legislation provided there were greater certitude that it would be aimed solely at the individuals indicated above.

There is legitimate concern that the ambiguity, vagueness and excessive broadness of the wording of the legislation could encompass persons and agencies not intended. The following examples illustrate persons who are paid and at times, as part of their responsibility, assist undocumented aliens to find jobs.

1. A lawyer who assists undocumented aliens in qualifying for labor certification.
2. Paid employees of the many voluntary agencies that might help undocumented aliens obtain employment while assisting them with their particular immigration problem.

¹⁴ Congressional Record, October 18, 1977. S. 18067.

¹⁵ "Undocumented Aliens Fact Sheet". P.2.

According to the present wording of the legislation, these bonafide persons could be indicted under this section and be subject to severe criminal penalties.

It is suggested that the wording of the proposal be changed so that there is no doubt that the legislation will be restricted solely to job "brokers", agents or smugglers, etc., and not include lawyers and employees of volunteer agencies who might assist on an individual basis an undocumented alien to obtain employment.

Needed Review of Current Immigration Policy

CHARLES B. KEELY*

THERE is fairly widespread agreement in and out of government that a major review of U.S. immigration policy is necessary. The Interagency Task Force on Immigration Policy included in President Carter's proposals on undocumented immigrants, the proposed National Commission on Immigration contained in legislation sponsored by Representative Joshua Eilberg, chairperson of the House Subcommittee on Immigration, the scheduled hearings of the Select Committee on Population, chaired by Congressman Scheuer, are some indicators of a feeling that our immigration policy is in need of a general review.

It is not difficult to justify such review. By its nature, immigration policy refers to a fluid situation which is responsive to international and domestic developments. Simply go through a list of current issues facing us in the immigration field which require a great deal of hopefully informed study and even more wisdom to resolve. A few items on such a list would have to include: refugee policy; the impact of immigration on population; naturalization law; the interaction of immigration and policy towards underdeveloped countries; the preference system and its relation to the brain drain; the impact of immigration on domestic manpower development; undocumented immigration; a review and evaluation of the Western Hemisphere amendments of 1976; and the development of a worldwide system of immigrant selection. Such a list does not even get to procedural and administrative problems such as border management, interagency cooperation, or organizational structure and procedures to coordinate policy within departments, such as, immigration and foreign policy in the State Department, or manpower policy and immigration in the Department of Labor.

Clearly, the task of reviewing immigration policy, developing new thrusts, and coordinating organization within and among agencies is an immense one. The list of substantive items which I have given, and many others have

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their own lists, will only be a laundry list unless the terms are put into a framework for policy analysis and development and tackled in some kind of priority ordering. Unless a framework is developed for policy analysis and priorities assigned, the task of needed review and policy development will be impossible.

I will discuss some of the items mentioned in an effort to begin to bring some order to the task facing us on immigration policy.

The best way to start is to note that one of the developments in the area of immigration in recent years has been an increasing awareness and even acceptance of the interrelationship of immigration policy with other policy areas affecting the country. Such a realization is no deep and startling insight. We are all aware that immigrants have an impact on the labor force, that the policy of the United States towards accepting individuals from certain countries or with certain characteristics impacts foreign relations. The increasing awareness of the importance of the international movement of manpower, its origin in the displacement of labor by economic development, and its role in enhancing or limiting further development of the sending and receiving economies are all fairly commonplace at this point. Nevertheless, the realization of the interplay of immigration with these other policy areas is an important step in policy development. Immigration does not take place in a vacuum. It is not just a domestic policy. Its complexity stems not just from gingerly balancing domestic ethnic political interests. Those of you familiar with legislative developments realize that the acceptance of the wider context of immigration policy, dealing with its interrelationships with other policy questions in a serious way is a new direction. In line with this I will first talk about three areas where immigration interacts with other policy areas and discuss the importance of these for immigration policy review.

IMMIGRATION POLICY AND LABOR POLICY

The question of undocumented immigrants and their impact on the labor force is at the center of the stage in policy analysis, especially in regard to proposed solutions, particularly the employer sanctions plan. In the longer run however, there is a serious question about the contribution of immigration, both the legal and undocumented, to the supply of labor for a shrinking number of jobs requiring low skills and low education. We need serious analysis of population and labor force projections and the role of immigration in the 1980s and 1990s. It is hard for some to fathom the possibility of labor force shortages in the next 10-15 years, but it is a distinct possibility. There is a general feeling that the number and characteristics of immigrants ought to be programatically related to the amount of unemployment in the United States. However, we have never really examined the fundamental question

of whether immigration creates employment or adds to unemployment, or more precisely what various mixes of immigrant labor force characteristics and fertility patterns have on the employment picture. It is for these reasons that there is genuine concern about the size and the labor force impacts of undocumented immigration, particularly in certain regions of the country. It is for this reason also that many people oppose the temporary worker programs because they are seen not only as maintaining a situation where wages and working conditions of U.S. laborers can be undercut, but also as allowing inefficiency to continue and needed modernization and capital investment not to be undertaken.

There are a number of possible changes in immigration policy which can affect labor in the United States. Let me suggest a few items for consideration. I do this not to defend any of these but to illustrate possibilities and stimulate thinking. One suggestion is to drop the third and sixth preference so that the preference system includes only the humanitarian functions of family reunion and refugee resettlement. In this case, no person would be given a visa preference on the basis of education or skill level. Perhaps an exception could be made for the truly outstanding internationally renowned individual. For the bulk of persons who now receive a third or sixth preference, however, the elimination of the advantage in obtaining a visa could be justified on the basis that such applicants are basically competitors with the American workforce at the present time. Under such a rearrangement of preference systems, a larger number of nonpreference immigrants may be able to enter the United States. The current labor certification system could be maintained, if it were deemed necessary to do so, or an alternative acceptable screening process may be substituted to avoid having nonpreference immigrants compete with U.S. job holders. The elimination of occupational preferences also deflects criticism of the real or apparent encouragement of a brain drain by U.S. policy and legislation.

One could also indirectly impact the U.S. labor force by granting permanent resident status to a larger number of people who invest in the United States. Currently an active investment of \$40,000 is needed to be exempt from labor certification in the visa process. Such a figure should perhaps be increased. One might also wish to add passive investments of a substantial amount that would increase the number of jobs in this country. Such a substantial investment could be beneficial for the U.S. labor force as well as for the health of the economy. In short, there are possibilities to coordinate economic development in the U.S. and immigration. Obviously these particular suggestions are only examples. As noted, my purpose is not to argue in favor of these or any details about them, but merely use them to point out the possibility of integrating immigration policy with labor related policies which would be beneficial to the U.S. workforce.

It is really not possible to leave the area of immigration policy and its

relation to manpower policy without bringing up the question of temporary worker programs. The United States now has a temporary worker program, with a large proportion in the agricultural sector. The use of the H2 visa results in approximately 20,000 agricultural workers being brought into the United States, a majority of them are from the West Indies, although the number also includes about 6,000 engaged in the forest industries from Canada. The current administration is on record as opposing the reintroduction of Bracero type program which includes opposition to expansion of the number of H2 visas for temporary work, as explained by Annie Gutierrez in her remarks at this conference. President Carter directed Secretary of Labor Marshall to review the H-2 program to see if it is meeting the needs of the agricultural sector in the United States. This review, therefore, should not lead to recommendations to expand the numbers involved in the program if current policy is retained.

We should remember that temporary labor is not always temporary. The experience of the United States with the Bracero program and of the immigrant receiving countries of Europe with their temporary worker programs both include the fact that temporary workers drop out of the migrant stream and that temporary worker programs are frequently accompanied by clandestine migration by both workers and family members of the authorized temporary workers. In addition, temporary labor programs are very much open to abuse. Frequently they require a worker to be under contract, which leaves the worker open to exploitation on the part of employers. Further, worker complaints about working and living conditions, about pay levels, about costs of food and other supplies are frequently ignored or can lead to firing and exclusion from the country. One of the reasons frequently cited for termination of the Bracero program was the terrible conditions suffered by the temporary workers and the difficulty, if not impossibility, of proper enforcement of the law concerning conditions of employment.

Perhaps what is necessary is to re-evaluate the question of temporary labor programs by focussing not on the need for laborers to work under certain conditions which are frequently found to be less than minimal, but rather to focus on the question of enforcement of minimal labor standards in the United States. In other words, perhaps the issue should not be whether or not to increase temporary worker programs in the United States, but rather to focus on the spread of effective protection of workers in the United States, in all sectors of the economy. This may include increased appropriations for the enforcement of current law, and perhaps extending the protection of current law to workers who are not currently covered.

One final manpower issue which interacts with immigration policy is the area of taxation of U.S. nationals employed abroad. Recent changes in the tax law have reduced the favorable treatment of persons employed outside the United States. Such changes may reduce the attractiveness of employment

in foreign countries and may then lead to the employment of more local nationals in the companies owned or affiliated with U.S. corporations. In some ways, the increased employment of local nationals in multinational corporations centered in or controlled by U.S. companies may be looked upon as a positive development. On the other hand, this also means that there is greater dependence on foreign nationals in the overseas operations of U.S. businesses. This may lead to a concentration of foreign nationals in certain areas of operation, for example, in overseas marketing. The greater employment of foreign nationals and perhaps even the dependence on them in certain key areas of foreign operations may lead to an increase in the effective demand for L-visas (intra-company transferees) into the United States and eventually adjustment of status to permanent resident alien. It is not clear that the United States has a policy which may encourage a "drain" of high caliber business executives to the United States in multinational corporations to counteract the dependence on foreign nationals in key operations. The numbers involved and the impact on U.S. business and investments is an area which may need analysis.

IMMIGRATION POLICY AND FOREIGN POLICY

Currently, there are five ways for a person to become a refugee to the United States. The first is under Section 212 (d) (5) of the Immigration and Nationality Act, which gives parole power to the Attorney General. The use of parole power to admit refugees to the United States has been widely used to admit large numbers of people, beginning with the Hungarian revolt in the middle 1950s, and most recently with the acceptance of Vietnamese refugees into the United States. The legislative history of parole power makes it clear that it was not originally intended for such large scale movement but was to provide flexibility for emergency cases of individuals or small groups of people where quick action was necessary. The development of the use of parole power may in fact constitute something of a gloss on the law. However, there is clearly uneasiness with the current practice both within Congress and the Executive.

The second way a person can be a refugee is under Section 203 (a) (7) (seventh preference) which provides for 10,200 visa numbers for conditional entries. The definition of refugee under that section of the law limits the refugee preference to persons fleeing a Communist country, from the Middle East, or from a catastrophic natural calamity.¹

Further, a person can receive a refugee status under Section 243 (h) of the

¹ Although the United States has acceded to the U.N. protocol on refugees contained in that protocol has yet to be introduced in Section 203 (a) (7). I am unaware of any significant opposition to the U.N. definition replacing the current definition, but it has yet to be substituted.

immigration law by having an immigration judge issue a stay of deportation either, 1) because the person will be subject to persecution if he returns to his or her country or, 2) because the return of the individual would be a violation of the U.N. protocol to which the United States has acceded. By either of these two tests, an immigration judge may issue an order to stay indefinitely, deportation which, in effect, grants a refugee status to the individual. Finally, an individual may be given asylum in the United States in emergency cases. Although asylum is not granted frequently, it is a dramatic form of gaining a *de facto* refugee status and possibly receives more publicity than the more usual methods.

These five different ways to become a refugee illustrate the lack of a refugee policy in the United States. Currently the administration is having difficulty developing a coordinated policy on refugees in response to the pending legislation introduced by Congressman Joshua Eilberg to revamp refugee policy. The basic bone of contention seems to be the reconciliation of the desire to have an orderly way of admitting refugees by reserving a fixed number of visas for them and the need for flexibility in reaction to emerging situations. The fixed visa approach has the advantage of a clear statement in the immigration law that the United States has a respect for and a desire to promote human rights and is willing to take its "fair share" of refugees from around the world. On the other hand, there is agreement that a fixed number of refugee visas will not always meet emergency situations, which may require an increase in an annual allotment. Most recently the case of the Indochinese refugees, and in fact the continuing plight of the boat people, makes it clear that a fixed annual number may not be adequate or realistic. Thus, the tension exists between the goals of combining a fixed number in immigration policy, which leads to a predictable and orderly introduction of refugees each year, versus flexibility in the matter of refugees. Even if the competing demands of order and flexibility are resolved, that does not really constitute a refugee policy. The larger issue remains concerning the U.S. stance toward persecution for political, religious, or nationality differences. To what extent will the United States use the acceptance of refugees as a tool in foreign policy? Exactly how far is the United States willing to extend the definition of refugee at this point?

The question of refugees is not the only foreign policy area which intersects with immigration policy. The flow of manpower to centers of capital and economic growth and the question of the brain drain both indicate that international migration is intimately bound up with foreign policy and particularly with development policy. The movement of populations, along with the movement of capital and commodities, and the patterns which have evolved in these movements, are all integral to the examination of the international economic order and in the North-South dialogue. There apparently is no integrated position on international migration in U.S. foreign policy at this point

which is reflected in development policy and in the various forums of North-South dialogue. Apparently international migration is not a substantive issue in the State Department.²

Moreover, it is not clear where in the Department of State responsibility should lie for developing and integrating international migration policy into an overall foreign policy. There are a number of possible contenders for primary responsibility in this policy area. To begin, there is the Bureau of Consular Affairs, with its vast experience in visa operations, and its familiarity with consular personnel, difficulties at foreign posts regarding immigration matters, and its wealth of experience concerning the development of immigration policy and the domestic interest groups involved in that process. The Office of Humanitarian Affairs, with its responsibility for refugee matters, obviously has an important stake in the development of international migration policy since the refugee component is such a large part of that policy and particularly for foreign policy purposes. Further, there is an Office of Population within the Department of State, which could possibly have important input into the question of international migration within the context of population issues which include population growth, fertility, labor force growth and opportunities, urbanization, and other aspects of population which may lead to or contribute to emigration from source countries to the United States. Further, there are the various bureaus within the State Department, with responsibility for large regions of the world, and the country desks within those bureaus, where important and emergent information is monitored, and which have primary responsibility for policy development for their respective geographical areas. In short, besides the substantive issue of immigration policy and relation to various aspects of foreign policy, there is the organizational question of the location with the Department of State, or perhaps the coordination within the Department of State of the various bureaus and other organizational units which have responsibility or important information required to develop a coordinated foreign policy stance on international migration.

POPULATION

When we think of immigration and population in the United States, the first question that comes to mind is probably the contribution of immigration to population growth. While it is true that immigration has become an increasingly important part of population growth in the United States, this is due in large part to the fact that fertility has declined in the United States. Therefore, as fertility has declined and immigration has increased slightly, the proportional

²Substantive issue is a State Department "buzz word" which refers to an item which is systematically monitored, evaluated and integrated into policy.

contribution of immigration to population growth has increased. Nevertheless, work done for the Commission on Population Growth and the American Future, as well as work on the size of net alien migration to the United States and its contribution to future population growth, indicate that the contribution of immigration to the size of the future population and to the process of achieving a stationary population (that is, a no growth population) is smaller than one would think from the proportional contribution of immigration to population growth at this point. This is perhaps not the place to go into detail concerning the technical aspects of population projections and the estimates and assumptions that must go into them. However, there is widespread agreement that the role of immigration is not the major obstacle to achieving a zero population growth. In fact, immigration may have an important role in stabilizing the age distribution as we proceed on a path to zero growth. Even the organization, Zero Population Growth, in its analysis of immigration, calls for a net alien immigration of 150,000 people. Currently, if one subtracts the estimates developed at the Census Bureau of the emigration of the foreign born from the annual immigration of nearly 400,000 aliens to the United States, our current net alien immigration is about 265,000 people. From this one must subtract the effects of all the other components of civilian and military movement to and from the United States, including emigration by the native born, the movement of U.S. citizens born abroad to the United States, and net movement between the United States and Puerto Rico and other territories. In short, even with current net alien immigration and given current fertility levels, the United States will probably achieve a stationary population.

Perhaps the more serious population policy question is not the contribution of immigration to size and growth, but rather the future of intergroup relations, particularly in local areas. Concentration of immigrants from particular ethnic groups and the differential patterns of ethnic fertility (some groups of foreign born having higher fertility than the U.S. native population and some lower than the U.S. native population) can possibly contribute to tension among various groups. Ethnic fertility levels do not necessarily have to result in a real difference in the development of population size within small areas but the mere presence of differences, despite what their effects might be on future population size, can have important symbolic meaning. It is in this context that we lack sufficient data concerning the fertility of the foreign born, as well as the changes over generations in the fertility patterns of ethnic groups.

Another important aspect of population policy concerns revenue sharing in the United States. Since different areas are impacted differently by immigration, the importance of accurate counts of estimates of the population for revenue sharing becomes clear. We also know that the Census, despite its efforts, does not count every individual in the United States. The Census

Bureau is the first to admit this, and provides detailed analysis and estimates of the undercount of their own operation. In some ways, this professional responsibility and openness of the Census Bureau, in making clear the deficiencies of the Census, has led to some of the problems which the Bureau now faces. One of the findings of the Census Bureau analysis is that the undercount of the population is not randomly distributed. The undercount of the Black population, for example, is much higher than that of the White population. We are not sure to what extent Spanish speaking or other minority groups are also undercounted, but there is obviously the possibility that they too are disproportionately undercounted in the Census. Further, the estimates for revenue sharing purposes made between Censuses are not sensitive to the amounts of internal migration, and especially to international migration, including undocumented movements, into areas defined for revenue sharing purposes. Given our current data system, and the techniques available, it is just not possible to tease out the kind of estimates called for by revenue sharing legislation, especially because of the particular problems of sensitivity to the migration component. Local areas impacted by international migration and having large numbers of people who are likely to be undercounted or underestimated may be receiving less than their due according to the formulas provided by revenue sharing. This situation is further exacerbated if revenue sharing formulas call for an increase in revenue not only on the bases of population, but also on such other population characteristics as the proportion of people below poverty level. Experience to date shows that the undocumented population are more likely to be in lower socioeconomic levels. Thus, an area with populations who are more than usually undercounted are doubly affected since the lower socioeconomic characteristics are also not accurately counted. In fact, for some formulas the effect of missing data on socioeconomic characteristics has greater impact than the undercount of people. This state of affairs has led to bills being introduced in Congress calling for an official adjustment to census counts in order to remedy this situation. The technical possibility, as well as the practical feasibility, of developing a uniform set of adjustment procedures to fit all 38,000 revenue sharing units, 15,000 of which contain less than 500 people, is certainly difficult. Whatever these difficulties, it is clear that the question of immigration and domestic policy concerning distribution of federal funds is not of small import for certain areas of the country, including the border states, and such traditional immigrant receiving areas as New York City.

Finally, there are the special cases of the state of Hawaii and the Commonwealth of Puerto Rico. In both places there have been calls for greater local control of migration to these island areas. Hawaii has been designated by a large proportion of immigrants from the Pacific as the place of intended residence on visa applications. Puerto Rico has also been an area of reception for Spanish speaking immigrants to the United States and

also has been affected by undocumented movement within the Caribbean, sometimes for employment within Puerto Rico or as a stepping stone to the mainland.

NATURALIZATION

Naturalization and citizenship law in general need to be thoroughly reviewed. There is ambiguity about citizenship in current law and practice. A person born in the United States is a citizen by virtue of birth. However, an individual born in the United States whose parents are undocumented is in effect deported when his or her parents leave the United States, either through deportation or through voluntary departure. Major efforts are not made by U.S. consuls abroad to look out for the interests of those American citizen children who are forced to leave this country with their parents.

Second, immigration law restricts benefits to parents of U.S. citizens to adult citizens. The reason for this is clearly to prevent persons coming to the United States solely for the purpose of having an American citizen child and thus indirectly procure a benefit by virtue of delivery of a child on U.S. territory. Further, only adult citizens can petition for fifth preference for a brother or sister. The granting of citizenship solely by virtue of birth within the confines of the United States clearly confers a benefit which the United States does not want to fully recognize, either in practice through protection by officials in the United States government overseas, or by statute in reserving some benefits only to adult United States citizens. A review is needed to decide whether the United States wants to maintain the concept of citizenship based solely on birth within the territory, or whether it will require some consanguineal aspect to confer citizenship on a person and under what circumstances a consistent principle should be applied to limit the citizenship rights, benefits, and duties of minors.

The second area of citizenship law which needs analysis is the area of revocation of citizenship. The Supreme Court has, within the last twenty years, held that four reasons for the revocation of citizenship are invalid. (Deserting the armed forces in time of war, *Trap v. Dulles*, 356 US 86, 1958; departing from or remaining away from the U.S. to avoid military duty, *Kennedy v. Francisca-Martinez* and *Rusk v. Cort*, 372 US 144 1963; extended residence outside the U.S. by naturalized citizens, *Schneider v. Rusk*, 387 US 253, 1964; and voting in a foreign political election, *Afroyin v. Rusk*, 387 US 253, 1967.) The basic issue is whether citizenship, by birth or naturalization, is in effect irrevocable. That is, if not fraudulently obtained, shall citizenship be revoked for deeds committed before or after obtaining citizenship? The issue is not whether naturalization fraudulently received should be revocable but whether citizenship once granted should be withdrawn by the government. The general movement of the Court has been in the direction of making

citizenship more inviolate under the theory that in the United States, "the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship" (Justice Black in *Afroyin v. Rusk* 387 US 253, 1967, p. 255). Nevertheless, the issue has never been so clearly drawn and a decision rendered which would prohibit the government from revoking citizenship. (*Afroyin v. Rusk* was a 5-4 decision.)

Finally, there is the question of the development of the concept of dual citizenship within American citizenship law. Countries of emigration such as Italy are interested in providing for dual citizenship by bilateral treaty and have done so with countries of immigration. Generally dual citizenship is not recognized by the United States, the only exception being the state of Israel. The question arises in the current world situation, with the large amount of travel and long term but temporary residence for reasons of business, practice of profession and so on, whether dual citizenship may not be more appropriate, especially in the case of spouses or children who do not hold the same citizenship.

DATA REQUIREMENTS

The federal "system" for the collection of data on immigrants coming to the country and on the foreign born in subsequent years is in poor shape. Further, we do not collect information, even in terms of the total numbers involved, much less characteristics, of the people who emigrate from the United States. In short, we know precious little about who comes here and even less about their subsequent history. Without getting into the problems of invasion of privacy, I think that most would agree on the goal of having information on the additions to and subtractions from the population through international migration.

This is not the place to go into detail on the particular needs of the various agencies in the federal government which collect statistics on the flow of immigrations and the stock of the foreign born population. A good deal of the flow data is basically taken from administrative documents and the collection procedures, data processing and publication have all been subjected to some systematic evaluation and criticism. In fact, they are undergoing review within some agencies, notably the Immigration and Naturalization Service. The role of the Census Bureau, particularly through the decennial census, is extremely important in the area of data collection on the foreign born. There are some questions as to the wisdom of dropping the question relating to the birthplace of the parents of respondents to the Census questionnaire, since valuable information concerning the second generation is lost.

What is needed is to begin to work to develop a federal system on immigration and the foreign to routinely monitor and evaluate the effects of

policy and the progress of aliens in adjusting to the United States as their adopted country. A coordinated system with the federal government will take a number of years to develop and involves a good deal of thought and planning as well as technically trained personnel to install and operate an integrated system. Some agencies are beginning to address this question. The realization that immigration is not only a part of the past but important in current demographic dynamics is being translated into efforts to collect information on the immigrant component and its effect on population size, distribution, characteristics and change. Besides the developments within agencies, and here I have in mind particularly the Immigration and Naturalization Service and the Census Bureau which are frontally addressing the data requirements on immigration, agencies are beginning to talk to one another on definition consistency and data set linkages which are initial steps toward an integrated system of data collection for policy.

THE DEVELOPMENT OF POLICY

There is one final item that clearly must be addressed if we are to do justice to the question of a needed policy review of immigration. Each of the above substantive issues, namely, manpower policy, foreign policy, population policy, citizenship policy, and the technical question of appropriate information to monitor and evaluate policy, must wait, in a sense, on a very important procedural problem. To be quite specific, there is currently a political question about what the forum of forums for the development of policy will be, and, if there is more than one forum, what the working relationships among them will be. Traditionally, the subcommittee system within the Congress has been the major forum for the development of immigration policy. This has certainly been true for the last fifteen years. For most of that period, the House Subcommittee has been the major forum for the discussion for the development of changes in immigration policy and law. It is possible that the Senate will take a more active role in these discussions and in influencing and developing of immigration policy within the foreseeable future.

Second, there is a proposal now pending in Congress for a National Commission on Immigration. This bill was sponsored by Chairman Joshua Eilberg of the House Subcommittee on Immigration, Citizenship and Nationality Law. Such a commission was supported by the Domestic Council Task Force on Illegal Aliens under President Ford and also by the Interagency Task Force chaired by Secretary Marshall which made its recommendations to President Carter concerning undocumented aliens. In fact the report of the Marshall Task Force even included a full copy of the bill as one of the appendices to their report with a strong recommendation to the President to support it. Nevertheless, the President, using the reason that there have been too many commissions, rejected the proposal for a national commission and

instead proposed in his August 4, 1977 announcement of his proposals on undocumented aliens to establish an interagency Task Force on Immigration Policy. And finally, there is a Select Committee on Population, chaired by Congressman James Scheuer which, among the many topics on population within the United States and overseas, has planned to hold hearings on immigration and to include the topic in its report.

Therefore, we have a number of possible forums for the introduction of ideas and for carrying a debate on immigration policy. It is not clear whether the National Commission will be pursued further by members of Congress who support it or what action the administration will take if a bill authorizing such a commission is passed to the President for his signature. There has been some delay in the development of an Interagency Task Force. It is not clear when or how that delay will be cleared up, nor what effects the delay will have on the execution on the interagency review proposed by the President. Further, if the interagency review does begin, and then a National Commission bill is passed by Congress and the President decides to sign it, there is not yet any clear guidelines concerning the relationship between the Interagency Task Force and a National Commission in pursuing the review of immigration policy. If the National Commission idea is not pursued, the Interagency Task Force will then be able to take the initiative in developing a consolidated and integrated set of proposals for immigration policy change for the President within the next two years. What the chances of passage would be is totally beyond reasonable prediction at this point in time.

In short, there are still many questions about who will be doing what, what the various inputs into discussions and proposals will be, the strength of the various branches of government and executive agencies in controlling the development of proposals, the access of the public to the deliberations and in the shaping of recommendations. It seems to me that the most immediate and pressing question is the resolution of the question of which forum or forums will be used to address the policy and what the relationships among them will be. This is basically a question of control of problem definition and resources to pursue and analyze various facets of immigration policy. Whoever has the greatest control of processes and resources will be in a better position to present a coordinated and integrated approach to policy change. What the ultimate outcome of this immediate question will be is obviously important for the particular sets of policies which develop in the areas of labor and manpower, foreign relations, population, and citizenship.

CONCLUSION

I realize my review has been painted in rather broad strokes. Many are aware that numerous problems exist in immigration policy and there is widespread

support for a review. What I have tried to do, at a very general level, is to put some of the major problems in a framework, and at this point an admittedly very simple framework, of seeing that immigration policy perhaps should be addressed in terms of its interrelationship with other important domestic and foreign policy concerns. Once this is done, we will be able to see some of the implications of making particular changes in immigration policy on other areas affecting the life of the nation. Once that picture becomes clearer, it will be possible to coordinate the various aspects and features of immigration policy proposals into a unified package for presentation to the representatives of the people. It would be foolish at this point to present a long and detailed set of proposals for immigration changes. I doubt anyone is prepared or even able to do so at present. What is necessary is informed study and discussion of the intricacies in the policy areas, which I have briefly touched upon, and a sound assessment of current trends and possible future ones, so that we may make informed proposals concerning immigration. Immigration, as we all know too well, is one of those areas where people have very strong opinions. Unfortunately, we have very little information. It is not that the information could not be gathered or is not already available in scattered places to help inform decisions. Nor do I deny that, ultimately, certain hard choices will have to be made which are more a reflection of values rather than a particular set of facts. But we can find out more about trends in population size and characteristics, the future labor force that will be available to the United States and its characteristics, and the effects of international migration for many countries, which are of importance to us politically both in the developed and developing world. This is the kind of information which can be gathered and reviewed; which can inform development of policy in the immigration field; and which can be used not only to recognize the impact of immigration on other policy areas, but also to coordinate and mutually reinforce immigration and other policy.

Finally, by its very nature, immigration is one of those policy areas which needs to be constantly monitored. Immigration policy probably should never be etched in stone. I would not be surprised, nor particularly disheartened, if, after a major review of policy were made and enacted into law, that law were amended very soon after to reflect changing conditions. Nor would I be surprised if after another twenty to twenty-five years, another call is made to review immigration policy because of the changes in the United States as we approach the year 2000. Because immigration and the conditions in which it takes place are constantly undergoing change does not mean that we should not try to chart the major trends in international migration and to take a comprehensive look at policy. I join in the chorus of those who call for such a review. The task is both intellectually and politically an immense and difficult one.

Undocumented Aliens: Current Legislative Proposals

SAM BERNSEN*

ON August 4, 1977 President Carter, at a White House briefing, announced that he was sending a message to the Congress on the complex problem of undocumented aliens. In response to that message Senator Eastland and Congressman Rodino introduced similar bills to enact legislation known as the Alien Adjustment and Employment Act.

The proposed legislation would deal with the problem of undocumented aliens by regularizing the status of many already here and discouraging the entry and stay of others by turning off the job magnet that draws them. The magnet would be turned off by imposing penalties on their employers.

Two formulas have been offered for regularizing or adjusting status. The first would accord lawful permanent residence to aliens who entered the United States prior to January 1, 1970 and the second would grant five years of special temporary status to those who entered between January 1, 1970 and January 1, 1977, inclusive.

To qualify for permanent or temporary status continuous residence in the U.S. from the date of the qualifying entry would have to be shown. Thus, temporary departures would not be disqualifying as continuous physical presence in the U.S. is not required. The alien would be ineligible for permanent or special temporary status if inadmissible under the immigration laws on criminal, immoral, narcotic, subversive or alien smuggling grounds, or if he assisted in persecution of any person on account of race, religion, nationality, political opinion or membership in a particular social group. Those accorded permanent residence would not be counted against the numerical limitations on immigration.

Additional restrictions are imposed on eligibility for special temporary status in the case of an alien who was a nonimmigrant. 1) By January 1, 1977 his authorized stay must have expired; 2) he must not have been a student at the time he lost lawful non-immigrant status; and 3) he must have complied

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with the two-year foreign residence requirement of Section 212 (e) of the Immigration and Nationality Act, or obtained a waiver of compliance, if he was subject to that requirement.

A deficiency with respect to any of these would be fatal to the application. Surreptitious entrants are not subject to additional restrictions.

No benefits are offered to those who entered after January 1, 1977. The employer sanctions provision would turn off the job magnet by imposing a civil penalty on an employer of an alien who is not authorized to work. The penalty could be as high as \$1,000 for each alien illegally employed. Injunctive relief to restrain employer violations would also be available. However, such relief could be sought only by the Attorney General and not by others such as unions or workers.

There is no requirement that the employer have knowledge that the alien was authorized to work. Employment agencies and unions would not be subject to sanctions for referring undocumented aliens to employers. The civil penalty and injunctive action would be aimed only at the employer who engages in a "pattern or practice" of employing undocumented aliens. The law would apply not only to new hires, but to continuation of employment of those hired before the law became effective. However, the employer would not be subject to the penalty if the alien's status was adjusted to permanent or temporary status or if his adjustment application was pending. Unfortunately, it is not stated when the adjustment must have occurred or when the pending adjustment application must have been filed. For example, is the employer saved from the penalty if the alien applies for special temporary status after penalty proceedings are instituted by the U.S. Attorney but before a decision has been made by the judge?

The legislative package submitted by the Administration is embroiled in controversy. Some advocate adjustment for all. Some say no law violators should be allowed to benefit from their violations.

Organized labor favors employer sanctions on the ground that they would preserve jobs for American workers. Employers and civil liberty groups are opposed. Employers charge that the proposed law would require them to be junior immigration officers in order to determine whether job applicants are aliens who are authorized to work, or U.S. citizens, particularly since a question of derivative citizenship is a challenge even to the expert. Civil libertarians fear discrimination by employers who would use the excuse of the potential penalty to hire only job applicants who did not have a foreign accent or appearance.

Some persons believe there is no problem because it has not been quantified and that the legislative proposals are based on inadequate information as to the number of undocumented aliens in the U.S., the number of jobs they hold, their social and economic impact, and the number that continue to enter. The hard data is that in the last fiscal year ending September 30, 1977,

over one million aliens, unlawfully in the U.S., were located by immigration officers and the number located has been climbing steadily since the end of the *bracero* program over a decade ago. It is recognized that the data includes repeaters but how many are caught more than once is not known.

Despite all the controversy, we may be approaching the beginnings of compromise. Those opposed to the employer sanctions provision may nevertheless accept it in some form as the price for an adjustment of status provision. Those who reject forgiveness for law violators may accept some formula for adjustment of status in order to win employer sanctions.

The formula we finally settle on should meet certain tests. Will it cause a mass exodus? Will it cause widespread firing of workers? Will it cause discrimination in hiring? Will it require employers to act as law enforcement officers? Will it require a nationwide screening of the entire American work force? Once the formula is devised, the next challenge is to set it forth in language that is clear and understandable.

How does the Administration's legislative package measure up against these tests?

The purpose of the special temporary status, according to the Administration is to preserve a decision on the final status of these aliens until much more precise information about their number, location, family size, and economic situation can be collected and reviewed. The information would be obtained from the applications for special temporary status submitted by the aliens.

Considering their natural fear and suspicion of Government, how many eligible aliens would apply for a special status that is only temporary? Some concerned organizations have stated they would advise against applying. Other persons involved in the problem feel that a future administration may be disposed to make an unfavorable decision on the final status of these aliens, particularly if their number is considered too large to absorb or if unemployment becomes too high. What is most likely is that the Government having extended an invitation to apply for special temporary status, will find itself ultimately bound to grant permanent residence as was done with the refugees invited to a temporary U.S. haven from Hungary, Cuba, Vietnam, Laos and Cambodia. By the time the decision has to be made on the final status of the "temporary aliens" many will have been in the U.S. 12 years. It, therefore, seems that the temporary status proposal for those who entered between January 1, 1970 and January 1, 1977 is merely a device to postpone their permanent residence. Opponents of any adjustment of status for law violators could well seize on this point to argue that the proposed legislation would really grant permanent residence on the basis of entry before January 1, 1977 rather than entry before January 1, 1970. Critics also point out that the temporary status proposal is an exercise in reverse logic because it rewards only law violators and does nothing for those who

obeyed the law.

A possible alternative would be to drop the temporary status proposal altogether and move up the crucial entry date in the permanent residence provision to January 1, 1974. To deal with the Administration's brain drain concern, an earlier entry date, going ten years back to January 1, 1968, might be specified for students and exchange aliens.

For those who entered after January 1, 1974, special legislation appears to be unnecessary. Under long established administrative practice aliens in whose cases there are compelling factors despite brief residence may be granted permission to remain in the U.S. indefinitely with work authorization.

With regard to the employer sanctions proposal, the approach is too sweeping. Why should penalties be imposed on the continuation of employment of previously hired undocumented aliens? This might require that the entire American work force of about 100 million be sanitized. It would not matter whether the worker was hired 40 years ago, or yesterday.

Why reach so far back in the screening of the work force? If permanent residence would be granted to aliens who entered before a specified date, why should an employer screen workers continuously employed by him prior to that date? For practical purposes, what should be discouraged is the future hiring of undocumented aliens so that the problem may be brought under control.

Some may say employer screening of previously hired workers will open up jobs for Americans. How many jobs? Would the results justify a massive disruption of the national work force? Even if a large number of jobs could be opened, should the U.S. adopt a policy so lacking in humanitarian considerations as to compel the sudden and widespread firing of undocumented workers, some of whom might even be U.S. citizens unable to readily prove their citizenship?

Another aspect of the employer sanctions provision that needs attention is the "pattern or practice" requirement. Could the law be effective with such a requirement? "Pattern or practice" may have relevance in a civil rights law to prove prejudice. Hiring an alien not authorized to work however, is a single transaction that can be prohibited and penalized. Moreover, if a "pattern or practice" must be shown, the law may not become operative for years and the essential witnesses, the undocumented workers illegally employed, would probably not be available when a case finally does come to trial. It would appear that the "pattern or practice" provision should be dropped. In its place could be substituted a requirement that the violation consist of knowingly hiring an alien not authorized to work.

To deal with the criticism concerning discrimination and the objection that employers should not be law enforcement officers, all new job applicants could be required to fill out a simple form prescribed by the Govern-

ment. If the job applicant declares on the form that he is a U.S. citizen or an alien authorized to work, or shows specified documentary evidence of citizenship or alien status permitting employment which he records on the form, the employer would not be subject to any penalty for hiring such worker. The employer would be penalized only for failure to obtain the executed form. The form would be prepared in duplicate. One copy would be retained by the employer to establish compliance and the other would be sent to the Immigration and Naturalization Service. INS would verify the worker's status according to both a rational and random formula as is the practice of the Internal Revenue Service in deciding which percent of the 80 million tax returns should be audited.

How many employers would hire undocumented aliens under the Administration's legislative proposal despite the possibility of a penalty is conjectural, particularly with the "pattern or practice" requirement. That requirement is so loose that many employers may choose to ignore the law. Nor is there any assurance that the Immigration and Naturalization Service (INS) will be provided the resources to process the large number of applications that may be filed for permanent and temporary status.

More important is the question whether INS will be able to grant timely work permission to applicants. It must be borne in mind that INS has been unable to act promptly on requests for work authorization submitted by a relatively small number of adjustment applicants under current law. The timely grant of work permission is vital. Under the proposed legislation, an employer would not be penalized for hiring an undocumented alien who had filed an application for adjustment to permanent or special temporary status. However, until the applicant, whose case is pending, actually obtains written work permission from INS, a prospective employer would be unlikely to hire him. Thus delay in the cases of eligible aliens would be unconscionable. Recognizing the importance of prompt action, a Federal Court in Chicago recently ordered INS to consider requests for work authorization within 48 hours in the cases of certain Western Hemisphere natives.¹ Until assurance is given that INS will act promptly to grant work authorization to eligible aliens, action on the proposed legislation should be held in abeyance.

¹ *Silva v. Levi*, 76 C 4268, March 10, 1977.

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